

LOOKING TOWARD THE CONSTITUTIONAL
BICENTENNIAL

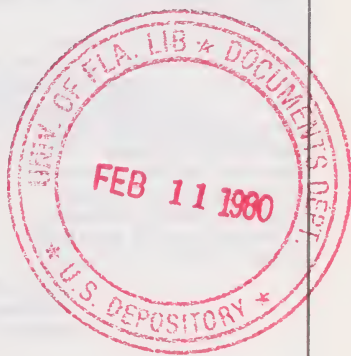
A Proposed Amendment To Permit Members of Congress
To Serve in Key Executive Branch Offices

COMMITTEE ON
BANKING, FINANCE AND URBAN AFFAIRS
HOUSE OF REPRESENTATIVES

96th Congress, First Session



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LETTER OF TRANSMITTAL

To the Members of the Committee on Banking, Finance and Urban Affairs:

Transmitted herewith for use by the members of the Committee on Banking, Finance and Urban Affairs are materials relating to a proposed amendment to the U.S. Constitution which would allow members of Congress to be appointed to positions in the Executive Branch without relinquishing their seats in Congress.

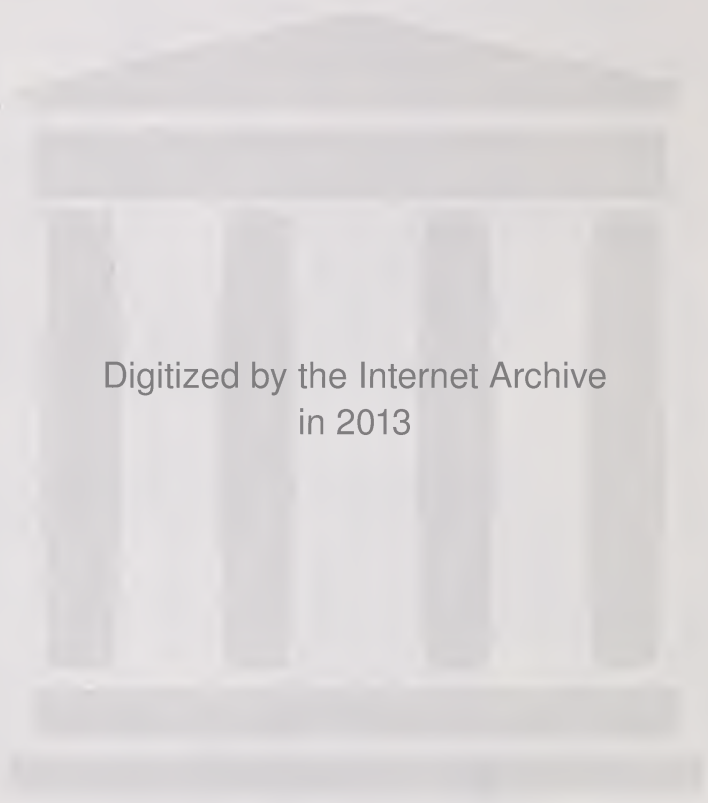
All of us have witnessed and experienced the legislative-executive stalemate which has become endemic in the federal government. I hope that this study will shed light on the causes of this stalemate, and on one proposed solution to it. Additional thought is obviously needed before deciding whether formally to submit the amendment.

I am grateful to the Congressional Research Service for a thorough investigation of the many questions raised by the proposed amendment, to the legal and governmental scholars who shared their insights with me, and to my colleagues in Congress who gave me the benefit of their practical experience of the executive-legislative relationship and how the proposed amendment might affect that relationship.

Sincerely,

HENRY S. REUSS,
*Chairman, Committee on Banking,
Finance and Urban Affairs.*

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LOOKING TOWARD THE CONSTITUTIONAL BICENTENNIAL

I. A PROPOSED AMENDMENT TO PERMIT MEMBERS OF CONGRESS TO SERVE IN KEY EXECUTIVE BRANCH OFFICES

(By Henry S. Reuss)

Our Constitution is approaching its 200th anniversary, in 1987. Its durability attests to the timeless principles of government it laid down.

But no constitutional document is above reexamination. Fortunately, we have reexamined our basic document from time to time, with good results—the Bill of Rights in 1791, the Equal Rights Amendments of the 1860's, the direct election of Senators of 1913, and the extension of the vote to women in 1920 and to young people in 1971.

With the bicentennial looming ahead, it may be a good idea to look again at our national charter, to discuss what changes, if any, are needed to bring our form of government closer to the ideals of the framers two centuries ago. Could it be that the problems of world peace, of energy, of inflation, and of recession have grown so complex that they strain the capacity of a governmental structure that seemed fit and serviceable back in 1787?

A possible constitutional amendment would permit Senators and Representatives to serve in the Executive Branch, and thus emphasize cooperation rather than stalemate in Washington and bring a "home town touch" to federal agencies now too often isolated in Washington.

Many Americans feel that their government—President and Congress—is failing them. Presidential appointees are often perceived as lacking skill in the art of government. Congress in turn, is frustrated because of its inability under the Constitution to fully participate in decisionmaking on vital questions like inflation, energy and unemployment.

Article I, Section 6 of the Constitution prohibits Members of Congress from being "Officers" of the United States—cabinet or sub-cabinet officials. All the other major democratic governmental systems—Germany, Japan, Canada, Great Britain, France, Italy, the Low Countries, the Scandinavian Countries—have governments comprised of leading legislators.

The proposed amendment would allow Congress to legislate a list of up to 50 top administration jobs which could be filled by Senators and Representatives. The President, in consultation with Congress, would prepare a slate of such jobs at the start of the new Congress every two years, and the slate would have to be confirmed by a ma-

jority of both Houses. The individual appointments, of course, would be subject to the usual Senate confirmation.

The amendment would make service in Congress more attractive, and put the emphasis on cooperation, by giving its Members a chance at holding posts of executive responsibility without interrupting their congressional careers. It would also give the President a wider choice of executive leaders, now denied him. Executive-legislative stalemate is a luxury we can no longer afford.

Legislators named under the new arrangement to government posts would retain their congressional roles, particularly that of constituent service. To give them time for their Executive Branch duties, they would be excused from congressional committee work (while retaining committee seniority). In addition, the time consumed by voting on the floor would be compressed by clustering votes.

This proposal, while borrowing the joint legislative-executive feature of the parliamentary systems obtaining in all the other great democracies, would not incorporate two other features of so-called "parliamentary democracy"—the selection of the Chief Executive by the legislature rather than by the people, and the power of legislators to topple the government at any time by a vote of lack of confidence.

The point of the proposal is to lessen destructive conflict between the President and Congress and emphasize cooperation rather than stalemate. Into the Executive's administration of the country would be factored the legislator's understanding of compromise, of representation and reconciliation of diverse interests, and the grasp of the legislative process which is often obscure to the Executive.

Strict separation of powers was written into our Constitution to overcome the spectre of domination by an unfettered executive. We were wise then, and are wise now, to diffuse governmental power, and to impose restrictions to keep it diffused.

But 200 years later, we often find ourselves unable to act cohesively, or even to decide on the direction in which we should be moving. The inevitable result has been stalemate, paralysis, and inaction. And the fruit of our inaction has been that the problems have just gotten worse, and more difficult to solve.

It is easy to attribute legislative-executive conflict to an outsider president unschooled in the ways of Congress. But the fact is that this conflict, and the resulting stalemate, have been the hallmark of most of the post-World War II presidencies, five of which were headed by former long-time members of Congress.

In truth, the Executive's responsibility to administer the country, and the collective and individual responsibilities of the 535 members of Congress to represent their respective constituencies and to legislate national policy, engender differing and often conflicting perspectives. The proposed amendment proposes to introduce into the Executive men and women who can give legislative perspective to administration policies, and to include in the Congress a leavening of the administrative point of view. The cross-fertilization could breed understanding and more effective problem-solving.

It could do this, furthermore, without significantly impairing our separation of powers. The amendment would not do away with a single prerogative of either branch. Congress' legislative and budg-

etary powers would be untouched, as would the President's authority to sign or veto legislation, to conduct foreign policy, and to appoint to government positions men and women of his own choosing.

The proposed amendment raises important questions:

(1) To what extent would the amendment modify the principles of separation of powers and checks and balances as they were conceived at the Constitutional Convention and as modified during the past almost 200 years? What would be the obligations of a federal Officer/Member of Congress in confirming executive appointments, or in voting on overriding Presidential vetoes? What problems would be created for an Officer/Member of Congress in responding to Congressional investigations?

(2) How would the amendment affect the conduct of legislative business? Could a Member vote or respond to a quorum call without being on the House or Senate floor? Would the number necessary for a quorum remain unchanged?

(3) Would the Office/Member of Congress be included, if a cabinet member, in the Presidential succession?

(4) What has the experience of nations with parliamentary government shown with regard to cooperation and communication between the government (which consists, of course, of members of parliament) and the parliament itself? Is there less stalemate and more accomplishment in parliamentary systems than in the United States' system? How are the potential conflicts raised in question 1, and the potential impediments to the conduct of legislative business raised in question 2, dealt with in parliamentary systems? Do parliamentary governments experience more frequent changes at the heads of ministries than does the United States at the head of cabinet departments? If so, does the greater turnover have a negative effect on those ministries' effectiveness? How do Members of Parliament who serve in the government divide their time between executive and legislative duties? Does alleged inattention to the specific interests of a member of parliament's constituency become a political issue for members who serve in the government? If so, would the differences between the roles of parliament members and Members of Congress tend to mitigate or exacerbate Executive Branch service by a legislator as a political issue?

(5) Would the press of executive duties permit the Officer/Member of Congress sufficient time to attend to constituent service and legislative responsibilities (other than committee work, from which the Officer/Member of Congress would be excused)? Is there a difference between the time constraints of service in the House of Representatives and those of Senate service? Would such a difference impair the ability of members of either House to be appointed to Executive Branch office?

(6) Would the requirement that the slate of proposed appointees to the offices designated by Congress be submitted and considered en bloc delay the appointment of cabinet members who are usually chosen before sub-cabinet officials? How, without undue delay, could a cabinet member choose or influence the choice of his subordinates, if they were both required to be approved at the same time by Congress?

As part of the dialogue which was the primary reason for proposing this amendment, the Congressional Research Service was asked to respond to the questions outlined above. The results of their research follow.

Copies of an explanation and text of the amendment were also sent to Members of Congress and to a sampling of the nation's most distinguished legal scholars and political scientists. Their responses are also included in this volume.

The reactions to the amendment by both Members of Congress and scholars vary widely. But among those with whom the amendment found little favor three themes predominated.

Checks and balances.—Some commentators worried that the amendment would dangerously disturb the system of checks and balances which controls excesses by the various branches of the government. Actually the amendment would not disturb a single one of the powers of any branch which are the real checks and balances. The President's authority to appoint government officials, to command the armed forces, to veto legislation, and the rest, would be left intact. Congress would retain the power of the purse, to declare war, to override presidential vetoes, and the rest of its arsenal. The judiciary's powers would be undisturbed by the amendment.

Conflict of loyalties.—Some correspondents worried that legislator/officials would be subject to a conflict between the loyalties which their legislative office creates, and those owed to the President and administration they serve as Executive Branch officials. But resolving conflicting loyalties is an old story to Members of Congress. A Congressman, in adopting a position on any issue, must consider the welfare of his state or district and of the United States as a whole, not to mention the loyalty he owes the House of Congress in which he serves and the party to which he belongs. Imagination will quickly suggest a host of additional loyalties—usually conflicting—which a Congressman considers. It is just such conflicts of loyalties which make the job as difficult as it is. No doubt members receiving appointments under the proposed amendment would be able to handle the additional conflicts creditably.

Limited time.—Many Members of Congress and some scholars were concerned that the burdens of service in Congress are already so great that Executive Branch service and service in Congress could not be combined. The research of the Congressional Research Service on this subject is evidence that their fears are not unfounded. But the figures adduced by the CRS are, it must be remembered, averages. Many members, especially junior members with little committee or subcommittee staff assistance, may indeed find the burden of Executive Branch service more than they can undertake. But more senior members, especially those who chair committees and major subcommittees and have substantial staff aid in discharging their duties, may be able to manage both sets of responsibilities. These more senior members would, moreover, be those most likely to be tapped for administration responsibilities. In any case, appointment would be voluntary. Members of Congress who felt they could not handle the time demands would simply decline appointment.

The text of the proposed amendment follows:

JOINT RESOLUTION PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES RELATIVE TO EXECUTIVE-LEGISLATIVE COOPERATION

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, to be valid only if ratified by the legislatures of three-fourths of the several States within seven years after the date of final passage of this joint resolution:

ARTICLE —

SEC. 1. Congress shall have the power by law to designate offices in the Executive Branch, not to exceed 50 in number, to which Members of the Senate and the House of Representatives would be eligible for nomination and appointment, regardless of the time when the office was created or the emoluments whereof were increased, without being required to vacate their offices in the Senate or the House of Representatives.

SEC. 2. Immediately after the commencement of a Congress in a year during which the term of a President begins, and in the year commencing every two years thereafter, the President shall submit en bloc a list of the names of prospective nominees, whether Members or not, to the offices designated pursuant to Section 1 hereof, to the Senate and the House of Representatives. If each House separately by a majority of its respective Members present and voting, a quorum being present, concurs in such list en bloc, the President shall nominate and, by and with the advice and consent of the Senate, appoint those on such list to the designated offices. In the event of a failure of either House to give its concurrence, the President shall submit a revised list of names of prospective nominees until concurred in by the Senate and the House of Representatives.

SEC. 3. During the time that a Member of the Senate or the House or Representatives serves in the designated office, his compensation shall be at the rate provided by law for the said office. In the event such Senator or Representative ceases for any reason to serve in the designated office before the expiration of the term for which he was elected, his compensation shall be at the rate then provided by law for Senators and Representatives.

SEC. 4. The Congress shall have the power to enforce this article by appropriate legislation or rules of procedure, as relevant and proper.

II. ANALYSES OF THE PROPOSED AMENDMENT BY THE CONGRESSIONAL RESEARCH SERVICE

1. AMENDING THE CONSTITUTION TO PERMIT MEMBERS OF CONGRESS TO HOLD SEATS IN THE PRESIDENT'S CABINET: SOME CONSIDERATIONS ON THE PROPOSED AMENDMENT'S EFFECT ON CHECKS AND BALANCES AND THE SEPARATION OF POWERS

(By Raymond J. Celada, Senior Specialist in American Public Law,
The Library of Congress, Congressional Research Service)

In recent weeks, a proposal has been submitted for consideration by Members of Congress and the academic community to amend the Constitution in order to allow Senators and Representatives to serve concurrently in high administrative positions.

The proposal in question is sponsored by Representative Henry S. Reuss of Wisconsin who, according to a recent news release on the matter, views it as a way of "emphasiz[ing] cooperation rather than stalemate in Washington, and thus bring[ing] a 'home town touch' to federal agencies now too often isolated in Washington."

Other benefits perceived as flowing from adoption of this constitutional change by its sponsor include creating a ready pool of personnel skilled in the art of government, promoting increased cooperation between the two political branches in meeting and solving the thorny and seemingly intractable problems that confront the Nation, and making congressional service more attractive. Thus, the mentioned press release of July 23, 1979, announcing Congressman Reuss' solicitation of views concerning his proposed constitutional amendment, states:

The amendment would make service in Congress more attractive, and put emphasis on cooperation, by giving its members a chance at holding posts of executive responsibility without interrupting their congressional careers. It would also give the President a wider choice of executive leaders, now denied him. Executive legislative stalemate is a luxury we can no longer afford.

Although the proposal has attracted some press coverage, e.g., Strout, "Let's put members of Congress in the Cabinet", The Christian Science Monitor, Friday, July 27, 1979, p. 23, it appears to be in its formative stages. Representative Reuss is apparently in the process of sounding out his colleagues and persons in both the legal profession and the academic community on the matter. Presumably, in the days and weeks ahead a wide variety of views and critical analysis will be forthcoming. Understandably, because of the contemporary novelty of the Wisconsin Member's proposal, there is a paucity of existing commentary on the subject. We say contemporary novelty

because, as will be noted shortly, suggested constitutional amendments along these lines are not unprecedented.

As indicated, the proposed amendment is intended to permit Senators and Representatives to serve in Executive Branch positions. Accordingly, both explicitly and by necessary implication, adoption of the amendment would override existing constitutional restrictions on Executive Branch service by congressional Members. These restrictions are found in Article I, § 6, cl. 2 which states that "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a member of either House during his Continuance in Office." Briefly, the Constitution in this regard imposes two distinct disabilities on Members: first, Members are ineligible for appointment to Executive Offices which either were created or the emoluments appertaining thereto were increased during the time (i.e., term) for which such Members were elected; second, persons are ineligible to simultaneously serve as Executive Officers and Members of Congress.

In pursuance of the first clause, the so-called Ineligibility Clause, Members cannot be appointed to an Executive Office either created or benefits relating to which were increased during the term for which they were elected. If either condition occurred in a prior term, this restriction would not apply. Because of the disparity in the terms of Senators and Representatives, the disability imposed by the first clause has longer durational consequences in the case of the former. In a pair of instances, namely the nominations in 1909 of Senator Philander C. Knox as Secretary of State and the nomination in 1973 of Senator William Saxbe as Attorney General, the emoluments portion of the Ineligibility Clause was raised as a bar to their respective appointments. In order to render both individuals eligible to the named secretaryships, legislation was passed by Congress reducing the salaries in question to that which they had been before their respective increases. On both occasions the strict constitutionality of such action by Congress was questioned by many.

In pursuance of the second part of Article I, § 6, cl. 2, the so-called Incompatible Offices provisions, Members of Congress have had their seats declared vacant for accepting commissions to Executive Offices, principally as officers of the volunteer and regular armed forces of the United States.

Clearly, Representative Reuss' proposed constitutional amendment is intended to render the described constitutional restrictions inapplicable, at least, to those Executive Offices which Congress would be empowered to designate as Executive Offices which could be filled by Senators and Representatives. It should be noted that the proposal explicitly and directly overcomes the first restriction, but obviates the latter by indirection. Thus, in the case of the former, it reads "regardless of the time when the office was created or the emoluments were increased", whereas with respect to the latter, it provides that "Senators and Representatives" would be eligible for "* * * appointment * * * without being required to vacate their offices in the Senate or

House of Representatives." Both parts of the existing constitutional restraint could be surmounted expressly and directly by inserting after the word "regardless" the prepositional phrase "of Article I, § 6 cl. 2."

Under the proposed amendment, Congress would be empowered to designate up to fifty Executive Offices which congressional Members could fill. Although the offices to be available for this purpose are left to the discretion of Congress, it is safe to assume that these will be mainly Cabinet and sub-Cabinet level positions since the express intention of Congressman Reuss is to allow Members "to fully participate in decision-making on vital [policy] questions like inflation, energy and unemployment." As a general rule, decisions relating to policy formulation, implementation and execution (cf. policy origination) are made at those levels. Appointment to lesser offices which in the ordinary course of events are more concerned with implementing administrative details would not only be seemingly inconsistent with the purpose behind the proposed amendment but as a practical matter might entail substantial financial hardship for Members appointed thereto since under Congressman Reuss' proposal Senators and Representatives appointed to Executive Branch positions are required to be compensated "at the rate provided by law for the said office."

Thus, Congress by legislation would designate as many or as few, but not to exceed fifty Executive Offices to which Members of Congress would be eligible for appointment without jeopardizing their status as either Senators or Representatives. Briefly, Members who are appointed to the designated Executive Offices would serve in the dual capacity of legislators and Civil Officers. The proposals would require "Immediately after the commencement of a Congress" (i.e., after the inauguration of a President following a presidential election) and "every two years thereafter" a President to submit an en bloc list of prospective nominees to Congress. The requisite list would include all nominees to the designated offices including prospective non-member appointees. In this regard, it should be noted that there would be no obligation on the President to fill any or all of the designated offices with Senators or Representatives. However, whether the President decides to ultimately fill all, some or none of the designated offices with Congresspersons, his nominees to fill such offices would have to be submitted en bloc for en bloc approval by a majority of the Members present and voting in each House. If the list of prospective nominees is concurred in by Congress, the President would thereafter follow the existing constitutional mode for making appointments. That is to say, the President would individually nominate and, by and with the advice and consent of the Senate, individually appoint those persons whose names appeared on the list of previously designated offices. On the other hand, if the en bloc list of nominees for the designated offices should fail to be approved by either House, the President would have to submit a revised list of prospective nominees and continue to make such revised submissions until approval of both Houses in the specified manner is realized.

The proposal does not expressly deal with the circumstance wherein the Senate withholds its advice and consent on one or more nominations of persons whose names appeared on an en bloc list previously approved by Congress. It may be that the author of the proposal con-

sidered a subsequent reversal most unlikely in the face of prior en bloc approval. If this seemingly remote eventuality came to pass, presumably one of two courses of action could be followed: either the traditional manner of making appointments would operate—a manner that would still obtain in all but appointments to the designated offices—or Congress, exercising its power to enforce the proposed amendment by appropriate legislation, could legislatively provide for such an eventuality. Appointments to the designated offices which occur at other times by reason of death, resignation, or removal of the incumbent presumably would follow traditional constitutional practice.

As previously indicated, a Senator or Representative appointed to one of the designated Executive Offices would be compensated “at the rate provided by law for the said office.” If for any reason a Member of Congress were unable to serve or continue to serve in a designated office, he or she would continue to serve his or her congressional term and be compensated “at the rate then provided by law for Senators and Representatives.”

Also, as previously indicated, Congress under the proposed amendment would be empowered to enforce it by appropriate legislation or procedural rules changes. An example of the exercise of the former power has already been noted. Possible rules changes—which each House, presently has plenary power to make under Article I, § 5 cl. 2—might include alteration of existing procedures to excuse Members who serve in Executive Offices from committee duties, to authorize so-called clustering votes, to permit absentee voting, and the like.

Clearly, the proposal in question imports a significant departure from existing constitutional principles, particularly in the area of the separation of powers and its corollary system of checks and balances. Indeed, the proposal bears some of the earmarks of the joint legislative-executive features of parliamentary systems (Cf. selection of the Executive by the legislature and votes of no confidence which can cause the fall of a particular administration.) Arguably, it might enhance the opportunity for the exercise of improper bias, self interest and undue influence, factors instrumental in the Framers’ decision to incorporate the existing restrictive features of Article I, § 6, cl. 2. See, Story, 2 “Commentaries on the Constitution of the United States” (Da Capo Press ed. 1970), §§ 864; 866–869. The Federalist No. 76 (Hamilton) (Modern Library ed. 1937). Notwithstanding this shift away from the prevailing relative separation of powers and the occasion for possible negative consequences sought to be avoided by the Framers, the proposal would not be beyond the scope of the amending power. In scope the amending power is now expressly limited as to but one subject, namely, as to the equal representation of the states in the Senate. However, it has been argued that even this limitation may be evaded by adopting a constitutional amendment eliminating the limitation upon the amending power, and thus opening the way to subsequent amendments providing for unequal representation of the states in the Senate. Willoughby, 1 “Constitutional Law of the United States” 598 (1929).

Arguments advancing support for the notion that there exist inherent limitations upon the amending power have been brushed aside by the Supreme Court. *National Prohibition Cases*, 253 U.S. 350

(1920). In his treatise on the "Constitutional Law of the United States," at 598-600, Willoughby treats the subject insofar as it impacts on changes in the internal affairs of the states as follows:

It has, however, been strenuously argued by reputable writers that, although not expressly declared, there are limitations as to what may be accomplished by constitutional amendments to the Federal Constitution—limitations which are implied by the very nature of that instrument which, these writers declare, was intended to perpetuate a form of political union in which the States should have control over their own citizen composition and play a distinctive and definitively determined part in the general scheme of government that was to exist. Thus, it has been argued that the Fifteenth Amendment is unconstitutional, because it attempts, against the wills of the States that did not ratify it, to fix the composition of their several electorates.¹ As to this contention, it is sufficient to say that it was disposed of by the case of *Texas v. White*,² in which, speaking of the State of Texas which, at the time of this decision, had not ratified either the Thirteenth or the Fourteenth Amendment, Chief Justice Chase pointed out that by the Thirteenth Amendment the freed negroes, living in the State, necessarily became a part of its people, that the people still constituted the State, and that it was the State, as thus constituted and as a member of the Union, which was entitled to the constitutional guaranty of a government republican in form.

This disposes of the contention made by some writers that the Nineteenth Amendment, by denying to the States the right to abridge the right to vote on account of sex was in excess of the Federal Amending Power.

Similarly, there have been some who have argued that the adoption of the Eighteenth Amendment was an unconstitutional exercise of the amending power, since it sought to bring within Federal control a matter which, under the Constitution as originally drawn and adopted, it was intended should never be withdrawn from State control. So distinctively different, it is argued by writers taking this ground, is the matter of the regulation of the manufacture, sale, transportation, and exportation and importation of intoxicating liquors from all the other matters subjected by the Constitution to Federal regulation, that the Amendment constitutes an addition to the Constitution rather than an Amendment of it, and, furthermore, such an addition or graft upon it, as to disturb, if not to destroy, its essential character. And, it is declared, this brings the change outside the amending power, since, it is asserted, it could not have been the intention of the framers of the Constitution, or of those who originally adopted it, that, under the amending power, a way should be opened to defeat the essential purpose of the Constitution and thus, as it were, to destroy it.³

Space cannot be spared for a full discussion of the points thus raised. It is sufficient to say that, whatever be their merits,—which the author believes to be very slight—the Supreme Court has, in cases too numerous to cite, recognized the validity of the Eighteenth Amendment, and, in *Leser v. Garnett*⁴ has deemed the contention as to the invalidity of the Nineteenth Amendment worth only a very summary discussion. The court in that case said: "The first contention is that the power of amendment conferred by the Federal Constitution and sought to be exercised does not extend to this Amendment because of its character. The argument is that so great an addition to the electorate, if made without the State's consent, destroys its autonomy as a political body. This Amendment is in character and phraseology precisely similar to the Fifteenth. For each the same method of adoption was pursued. One cannot be valid and the other invalid.

¹ See, for example, the argument of A. W. Machen in his article "Is the Fifteenth Amendment Void?" in the *Harvard Law Review*, Vol. XXIII, p. 169 (January, 1900). Mr. Machen declares in this article that there has been no decision of the Supreme Court upholding the validity of the Fifteenth Amendment, but he is certainly mistaken as to this, for such a holding was necessarily involved in *Neal v. Delaware* (103 U.S. 370). As to this see the able article of W. C. Coleman, "The Fifteenth Amendment" in the *Columbia Law Review*, Vol. X, p. 416. In *Leser v. Garnett* (258 U.S. 130), the court cites, as recognizing the validity of the Fifteenth Amendment, *United States v. Reese* (92 U.S. 214); *Neal v. Delaware* (103 U.S. 370); *Guinn v. United States* (238 U.S. 347); *Myers v. Anderson* (238 U.S. 368).

² 7 Wall. 700.

³ See, for instance, the argument of W. L. Marbury in his article "The Limitations Upon the Amending Power" in the *Harvard Law Review* (December, 1919); and also his article "The Nineteenth Amendment and After," in the *Virginia Law Review*, Vol. VII, p. 1 (October, 1920).

⁴ 258 U.S. 130.

That the Fifteenth is valid, although rejected by six States . . . has been recognized and acted on for half a century. The contention that the Fifteenth was incorporated in the Constitution, not in accordance with law, but practically as a war measure which has been validated by acquiescence, cannot be entertained."

To the author of the present treatise, the fundamental error of all those who have sought to place inherent limitations upon the amending power as provided for in the Federal Constitution is that they necessarily start with the assumption that the Constitution is in the nature of an agreement or compact between the States, or that it implies an understanding between them, or between them and the National Government, that the allocation of powers as provided for in the original instrument shall not be changed in any of its more important or essential features. It is surprising to the writer that this theory which, since the Civil War, has been so decisively rejected by the American people and by the courts, should again be brought forward to support a constitutional argument.

The language and perhaps, more importantly, the reasons behind the Amending Clause of the Constitution inveigh against the notion of inherent limitations on the power. These reasons were explained by Story as follows: ⁵

In regard to the constitution of the United States, it is confessedly a new experiment in the history of nations. Its framers were not bold or rash enough to believe, or to pronounce it to be perfect. They made use of the best lights, which they possessed, to form and adjust its parts, and mould its materials. But they knew, that time might develop many defects in its arrangements, and many deficiencies in its powers. They desired, that it might be open to improvement; and under the guidance of the sober judgment and enlightened skill of the country, to be perpetually approaching nearer and nearer to perfection. It was obvious, too, that the means of amendment might avert, or at least have a tendency to avert, the most serious perils, to which confederated republics are liable, and by which all have hitherto been shipwrecked. They knew, that the besetting sin of republics is a restlessness of temperament, and a spirit of discontent at slight evils. They knew the pride and jealousy of state power in confederacies; and they wished to disarm them of their potency, by providing a safe means to break the force, if not wholly to ward off the blows, which would, from time to time, under the garb of patriotism, or a love of the people, be aimed at the constitution. They believed, that the power of amendment was, if one may so say, the safety valve to let off all temporary effervescences and excitements; and the real effective instrument to control and adjust the movements of the machinery, when out of order, or in danger of self-destruction.

Upon this subject, little need be said to persuade us, at once, of its utility and importance. It is obvious, that no human government can ever be perfect; and that it is impossible to foresee, or guard against all the exigencies, which may, in different ages, require different adaptations and modifications of powers to suit the various necessities of the people. A government, forever changing and changeable, is, indeed, in a state bordering upon anarchy and confusion. A government, which, in its own organization, provides no means of change, but assumes to be fixed and unalterable, must, after a while, become wholly unsuited to the circumstances of the nation; and it will either degenerate into a despotism, or by the pressure of its inequalities bring on a revolution. It is wise, therefore, in every government, and especially in a republic, to provide means for altering, and improving the fabric of government, as time and experience, or the new phases of human affairs, may render proper, to promote the happiness and safety of the people. The great principle to be sought is to make the changes practicable, but not too easy; to secure due deliberation, and caution; and to follow experience, rather than to open a way for experiments, suggested by mere speculation or theory.

Any doubts regarding the scope of the amending power were seemingly dispelled at an early date by Hamilton who in *Federalist No. 78* observed that the Constitution "admits the right of the people to alter or abolish [it], whenever [the people] find it inconsistent with their happiness * * *."

⁵ "Commentaries on the Constitution of the United States" at §§ 1821-1822.

As previously indicated, proposals to amend the Constitution in the manner advanced by the Reuss measure are not unprecedented. Three proposals to permit Members to simultaneously serve in the Executive Branch were introduced in Congress in the last years of the 19th Century.

Three attempts have so far been made to remove the inhibition in Article I, section 6, clause 2, of the Constitution which prohibits a Senator or Representative from holding any other office under the United States while still a Member of Congress [H. Res. 216, sec. 16, 1896, H. Res. 8, Mar. 8, 1897, H. J. Res. 31, Dec. 5, 1899.] If amended according to any of these resolutions the Constitution would permit a Member of Congress to be appointed to the President's Cabinet and still retain his seat, in the legislature. This is the English system and it is declared has its advantages in that it allows the legislators to come into more frequent contact with the heads of the departments and thus become better informed as to the needs of these departments of the government. There is the further reputed advantage in that it would furnish active leaders in Congress for the purpose of initiating legislation recommended by the President. "Proposed Amendments to the Constitution," House Document No. 551, 70th Congress, 2d Session (1929).

These proposals were referred to committee where apparently they remained undisturbed and unconsidered so far as the printed record is concerned. For that matter, their sponsors, Representatives Barrett and Roberts, do not appear to have made any Record remarks on the subject. Aside from the general comments made in the above quote it is difficult on the strength of this barren record to speculate with regards to what moved them to propose this change.

The record of proposed constitutional amendments both before and since publication of the 1929 study cited above suggest that the three proposals submitted between 1896 and 1899 are the only ones on the point. It is interesting to note in Professor Ames' award-winning essay on constitutional amendments proposed during the first one hundred years under the Constitution, that numerous proposals in the opposite direction were introduced in Congress. That is to say, modifications were suggested to Article I, § 6, cl. 2 which would have had lengthened or made absolute one or the other of its restrictions. His narrative exposition of the subject follows: *

No less than thirty-three resolutions have been introduced proposing that members of the Senate and House of Representatives shall not be eligible to any appointment or office. This proposition was first suggested by the conventions that ratified the Constitution in Virginia, New York, and North Carolina,⁷ and the attempt was made in both branches of the First Congress to add such an amendment to the series about to be sent to the States for their ratification.⁸ Amendments of this nature were also introduced in 1793, 1808, 1810, and 1818;⁹ and from 1820 until the early "forties" similar amendments were submitted at almost every session of Congress. The last one proposing a general disqualification from all offices was presented in 1850.¹⁰

The amendment proposed by the legislature of Tennessee in November of 1825 is of especial interest, as it was evidently prompted by the utterance of Andrew Jackson.¹¹ When Tennessee, in the fall of 1825, nominated him as a candidate for

* "Proposed Amendments to the Constitution, 1789 to 1889," House Document No. 353, pt. 2, 30-33 (1897).

⁷ App., Nos. 29, 62, 81.

⁸ App., Nos. 199, 275.

⁹ App., Nos. 317, 387, 400, 401, 479.

¹⁰ App., Nos. 493, 511, 516, 544, 546, 549, 569, 581, 595, 612, 642, 652, 655, 662, 670, 678, 680, 696, 715, 723, 727, 749, 755^a, 763.

¹¹ App. No. 549. See also similar resolutions of the legislature of Tennessee of 1827, arraigning Adams and Clay, which were unanimously adopted by the house of representatives and only two dissenting votes in the Senate. App. No. 581a. Niles' Register, xxxii, pp. 161, 183-186, 198. Counter resolutions of disapproval from the legislatures of Pennsylvania, Ohio, and Maine. Ibid. xlix, pp. 369, 429.

the Presidency for the election of 1828, Jackson immediately departed from Washington, and in a speech before the Tennessee legislature resigned his office of Senator in order that he might not be open to the suspicion of using that office to promote his candidacy. At the same time he declared he would "impose a provision upon the Constitution rendering members of Congress ineligible to office under the General Government during the term for which elected and for two years thereafter," except in the case of judicial office.¹² "The effect of such a provision," said he, "is obvious. By it Congress would be free from that connection with the executive department which at present gives strong ground of apprehension and jealousy on the part of the people. If the change should not be obtained and important appointments continue to devolve upon Congress, corruption will be the order of the day."¹³

However desirable, theoretically, Jackson believed this change to be, in practice he did more to create the need of such an amendment than all his predecessors.¹⁴ In this connection it is interesting to read what recommendation he made in his first message, of December 8, 1829. Evidently having in mind his previous recommendation, and conscious of his own inconsistency, he writes: "While members of Congress can be constitutionally appointed to office of trust and profit, it will be the practice, even under the most conscientious adherence to duty, to select them for such stations as they are believed to be better qualified to fill than other citizens; but the purity of our Government would doubtless be promoted by their exclusion from all appointment in the gift of the President, in whose election they may have been officially concerned. The nature of the judicial office and the necessity of securing in the Cabinet and in diplomatic stations of the highest rank the best talent and political experience should, perhaps, except these from the exclusion."¹⁵

It is somewhat surprising to find Clay in 1841 presenting a proposition similar to the one Jackson had been led to suggest because of Clay's acceptance of office in Adams' Cabinet. But times had changed. Clay was now attacking Tyler, the fear of Executive encroachments having taken full possession of him.¹⁶ His State likewise indorsed his views, and presented to Congress a resolution in favor of this restriction.¹⁷

The length of the period of ineligibility proposed varied somewhat. A large number provided that a member should be ineligible only during the term for which he was elected; others assigned a more extended period, varying from three months to two years thereafter. Still others provided that the ineligibility should last until the expiration of the Presidential term during which a person shall have been a Senator or Representative.¹⁸ One even of a retrospective character was introduced in 1822 by Mr. Blair of South Carolina, which provided that "no one should be appointed by the President to any office who shall have been a member of either House of Congress in the last two years preceding the election of the President."¹⁹ This was doubtless intended to prevent the President rewarding a member of the preceding Congress who had been especially active in working for his interests in the Congressional caucus of the party, which at this time usually made the nomination of the candidates of the different parties for the Presidency and the Vice Presidency.

Some of these resolutions made exceptions in favor of certain positions, such as appointments in the Army or Navy, while others, similar to the one introduced several times by Mr. Underwood of Kentucky, permitted the heads of the Departments to be selected from Congress.²⁰

The above propositions were of a very comprehensive character, some excluding members of Congress from all offices, both civil and military; the majority, how-

¹² Niles Register, xxix, 125, 155-157. Sumner's Jackson, p. 104, note 2.

¹³ *Ibid.*

¹⁴ "Of his first Cabinet, three were members of the Senate and one of the House; and Mr. Van Buren had been a Senator up to the 1st of January preceding. Many other members of Congress received important appointments. During the first six months of General Jackson's Administration more Federal appointments devolved upon members of Congress than had before fallen to their lot from the commencement of the Government, in 1789, down to the 4th of March, 1829—forty years." Salmon, *Appointing Power*, p. 55; Sargent, I, p. 164; *Am. Register*, v, 20:xxxvi Niles' Reg., p. 267. For protocol of original Jackson men arraigning him, see xl Niles, p. 387-389.

¹⁵ *Statesman's Manual*, p. 702. See Benton's *Thirty Years' View*, I, p. 86, for comments.

¹⁶ App., No. 715. Schurz, *Henry Clay*, II, p. 222.

¹⁷ App., No. 727.

¹⁸ App., Nos. 509, 655.

¹⁹ App., No. 511.

²⁰ App., Nos. 549, 569, 612, 652, 678, 723, 755d, 763.

ever, applying only to the civil offices. There were in addition a few amendments proposed, the provisions of which were less stringent than the preceding. One, introduced in 1846 by Mr. Bagby of Alabama, to render members of both Houses ineligible to a Cabinet position;²¹ also, a group of three amendments providing that no member of either House shall be eligible to the office of President or Vice President.²² The first of these resolutions was introduced by Mr. Bagby in connection with the above-mentioned amendment. It extended the time during which a member was ineligible to four years after the expiration of the term for which he was elected. One of the remaining two which were introduced in 1872, fixed the end of the period of ineligibility at two years after the expiration of the term.²³

In addition, Mr. Turner of Kentucky has twice proposed, during the later seventies, an amendment prohibiting the appointment of any Senator or Representative, during the term for which he was elected or two years thereafter, "to any civil office of profit under the United States which was created or the emolument of which was increased during the said term."²⁴

The significant shift away from the relative separation of powers protended by the proposal to allow Members of Congress to serve concurrently in the Executive Branch would place its adoption in an almost unique category insofar as changes to the original structure of the government are concerned. Aside from a minor court jurisdictional change and the alteration of the manner of electing Senators worked by the Eleventh and Seventeenth Amendments, respectively, the design and structure of government is in accord with the design and structure devised by the Framers. The overwhelming number of constitutional amendments approved to date have expanded the rights of citizenry. Alan P. Grimes has described the course of constitutional change over nearly two hundred years of experience under the Constitution in this context as follows:²⁵

When one lays the Constitution of the United States beside the twenty-six amendments to it, it becomes immediately apparent how little the original structure of government has been altered by the amendments. The judiciary, appointed by the President with the consent of the Senate for terms of good behavior, remains in its structure as designed by the Framers, even though it has grown awesomely in authority and has become the official guardian of individual rights. In only a minute matter of jurisdiction, changed by the Eleventh Amendment, has any amendment altered either the structure or the powers of the judiciary.

The President, elected by electors for a four-year term of office, has not had his jurisdiction altered by amendment, even though the office has changed from being merely the executive branch of government into what has been termed the Imperial Presidency. The most consequential change in the nature of the office, the democratization of the means whereby electors were chosen, took place in the states without a constitutional amendment. By 1832, all states except South Carolina provided for popular election of presidential electors. Only one amendment, the Twelfth, really altered the design of the Framers regarding the executive; it required the electors to vote separately for the offices of President and Vice President, which of course facilitated the rise of the modern political party system. Three other amendments, the two-term limitation (the Twenty-second), the allocation of electors to the District of Columbia (the Twenty-third), and the presidential succession amendment (the Twenty-fifth), do not alter the original design in any basic sense.

Two senators continue to represent each state regardless of the population of each state. Senators hold office for six-year terms, with the terms expiring for one third of their number every two years. The only constitutional change in the structure of the Senate has been the democratization in the mode of selecting senators; the people of the state, rather than the state legislatures, elect the Senate (Seventeenth Amendment). As Oregon demonstrated, however, this

²¹ App., No. 747.

²² App., Nos. 746, 1347, 1351.

²³ App., No. 1347.

²⁴ App. Nos. 1474, 1482.

²⁵ Grimes, "Democracy and the Amendments to the Constitution," 1-2 (1978).

change could have been brought about by the states themselves without necessitating a constitutional amendment, just as the democratization of the Electoral College was achieved without formal amendment.

Members of the House of Representatives continue to be popularly elected for two-year terms from districts drawn by the state legislatures according to an apportionment system determined by Congress. The major alteration here was in the removal by the Fourteenth Amendment of the odious "three-fifths" provision, which referred to the counting of three-fifths of the number of slaves as a basis of apportionment. Had the states themselves abolished slavery, of course, the three-fifths clause would have become obsolete. The other feature of the apportionment clause, which required that direct taxes be apportioned according to population, was altered by the Sixteenth Amendment, which permitted the levying of federal income taxes without regard to apportionment. This amendment should have been unnecessary; it came about as a response to a Supreme Court decision that reflected extraordinary political bias. Another Court might well have ruled differently on the case. Similarly, the prohibition amendment (the Eighteen, repealed by the Twenty-first) extended the power of Congress in an area of commerce where the courts had taken a narrow view of such congressional authority. The Twentieth Amendment simply moved forward the date on which elected federal officials would take office, so reducing the time between the election and the assumption of office.

In summary, putting aside minor and technical changes, as far as the structure of offices is concerned the design of the original Constitution has been altered by amendments in only one important respect: Senators no longer are the agents of state legislatures, but are elected by the people of the state. As far as the extent of national power is concerned, the powers of the judiciary, the executive, and the legislature remain essentially undisturbed by the twenty-six amendments. There was a slight diminution of judicial power in the Eleventh Amendment, a slight diminution of the political power of the executive in the Twenty-second Amendment, and a slight increase in legislative power in the Sixteenth Amendment. But no amendment other than that providing for the direct election of the Senate (the Seventeenth) has fundamentally altered the design of the original structure of government.

What has been altered, and altered drastically, by the amendment procedure is the collectivity of the rights of the citizenry. The spirit of the Bill of Rights did not stop with the first ten amendments; it is found in most of the remaining sixteen as well. Running throughout most of the amendments are two basic themes vital to the political system: the equality of rights, and the democracy of consent. It is as though the amendments constitute a bill of particulars that reflects the general philosophy of equal rights and self-government found in the Declaration of Independence. Where the Framers brought forth a lasting system of power and authority, the popular branches of government—the state and national legislatures—have through the amending procedure brought forth an expanding system of liberty. The edifice of power was constructed in one summer in Philadelphia; the democratization of liberty has been in progress for two hundred years.

Although the Constitution neither refers to the separation of powers as such nor contains a specific distributing clause, the doctrine has been described as one of the three "great structural principles of American Constitutional Law" Corwin, Introduction to the 1953 Edition, "The Constitution of the United States of America: Analysis and Interpretation," Senate Document No. 92-82 XXII (1973). (The other two great principles in the Corwin trilogy are the doctrine or concept of Federalism and the concept of a Government of Laws and not of Men.) "In its most dogmatic form the American conception of the Separation of Powers may be summed up in the following propositions: (1) There are three intrinsically distinct functions of government, the legislative, the executive, and the judicial; (2) these distinct functions ought to be exercised respectively by three separately manned departments of government; which, (3) should be constitutionally equal and mutually independent; and finally, (4) a corollary

doctrine stated by Locke—the legislature may not delegate its powers.” Ibid. Or, in the more simple and direct terms of Mr. Justice Sutherland, the concept of separation of powers:

*** may be stated *** as a general rule inherent in the American constitutional system that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise executive or legislative power. The existence in the various constitutions of occasional powers which by their nature otherwise would fall within the general scope of authority of another department emphasizes, rather than casts doubt upon, the generally inviolate character of this basic rule. *Springer v. Philippine Islands*, 277 United States 189, 201-202 (1928).

This “basic rule” reflects the Framers’ view that autocracy was virtually inevitable where governmental powers were largely concentrated in one or a few pairs of hands. Accordingly, they were persuaded that the surest way to safeguard liberty was to prevent a concentration of such powers by a purposeful division among various branches according to function: legislative, executive, and judicial. Possessed of virtual plenary authority in their respective spheres and assumedly jealous of one another’s respective prerogatives, each branch would check the other’s attempts at encroachment and, thus, keep the mechanism of government in the kind of perpetual balance that the Framers’ hoped would most conduce to the public good. The men at Philadelphia neither conceived nor intended to effect a hermetic separation which is both a conceptual and practical impossibility. In the first place the powers otherwise confined had to conjoin in order for government to operate effectively. In the second place, the overlaps or bridges between the powers were in themselves envisioned as checks on potential overreaching or abuse. This idea was perhaps best expressed by Mr. Justice Jackson, concurring in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952), as follows:

While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

The acceptance of the concept was so prevalent and complete at Philadelphia as to make its incorporation as “a fundamental principle of American constitutional jurisprudence” preordained. Adherence to the concept was confined to the federal sphere but prevailed in the drafting of state constitutions where it uniformly appears in one form or other.

All of the foregoing matters are summarized by Willoughby as follows: ²⁶

§ 1058. The Separation of Powers.

A fundamental principle of American constitutional jurisprudence, accepted alike in the public law of the Federal Government and of the States, is that, so far as the requirements of efficient administration will permit, the exercise of the executive, legislative, and judicial powers are to be vested in separate and independent organs of government. The value of this principle or practice in protecting the governed from arbitrary and oppressive acts on the part of those in political authority, has never been questioned since the time of autocratic royal rule in England. That the doctrine should govern the new constitutional system established in 1789 was not doubted. Washington, in his farewell address,

²⁶ Willoughby on the Constitution of the United States at 1616-1620.

said: "The spirit of encroachment tends to consolidate the powers of all governments in one, and thus to create, whatever the form of government, a real despotism." Madison, in *The Federalist*,²⁷ wrote: "The accumulation of all powers, legislative, executive, and judicial, in the same hands, whether of one, a few, or many, whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." John Adams²⁸ wrote: "It is by balancing one of these three powers against the other two that the efforts in human nature toward tyranny can alone be checked and restrained and any degree of freedom preserved;" and Hamilton asserted: "I agree that there is no liberty if the powers of judging be not separated from the legislative and executive powers."²⁹ Webster stated the same doctrine when he said: "The separation of the departments [of government] so far as practicable, and the preservation of clear lines between them is the fundamental idea in the creation of all of our constitutions, and doubtless the continuance of regulated liberty depends on maintaining these boundaries."³⁰

Under the influence of this doctrine most of the States in their first Constitutions incorporated what have since been known as "distributing clauses." Thus Massachusetts in her Constitution, adopted in 1780, provided that "in the government of this commonwealth the legislative department shall never exercise the executive and judicial powers or either of them; the executive shall never exercise legislative and judicial powers or either of them; the judicial shall never exercise legislative and executive powers or either of them; to the end that it may be a government of laws and not of men." Maryland in her first instrument of government declared "that the legislative, executive and judicial powers of government ought to be forever separate and distinct from each other," and New Hampshire provided that "the legislative, executive and judiciary powers ought to be kept as separate from and independent of each other as the nature of a free government will admit, or as is consistent with the chain of connection that binds the whole fabric of the constitution in one indissoluble bond of unity and amity."

In practically all of the State constitutions which have been adopted since the revolutionary period there have been either distributing clauses similar to those given, or express provision that the legislative shall be vested in the legislature, the judicial in the courts, and the executive in the executive organs therein created. A number of constitutions, however, are careful to state that the principle of absolute separation is not to apply in those cases in which express provision otherwise is made.

§ 1059. Separation of Powers in the States Not Compelled by the Federal Constitution.

It is to be observed that this general acceptance by the States of the principle of the separation of power is not one forced upon them by Federal law,³¹ except in so far as the prohibition of the Fourteenth Amendment with reference to the depriving any person of life, liberty, or property without due process of law is operative or possibly, in extreme cases, where it might be held that the government is not republican in form. Nor, as we shall later see, do the distributing clauses in the State Constitutions operate to prevent the consolidation of judicial, executive, and legislative powers in local government organs.³²

§ 1060. Powers Separated in the Federal Government.

The Federal Constitution does not contain a specific distributing clause, but its equivalent is found in the clauses which provide that "all legislative powers herein granted shall be vested in a Congress of the United States," that "the executive power shall be vested in a President of the United States of America," and that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish."

²⁷ No. 47.

²⁸ *Works*, I, 186.

²⁹ *Federalist*, No. 48.

³⁰ For these and other quotations see the valuable work of Dr. Bondy, *The Separation of Powers*.

³¹ For an early statement of this see *Calder v. Bull* (3 Dall. 386). In *Prentiss v. Atlantic Coast Line Co.* (211 U.S. 239), the court said: "We shall assume that when, as here, a State Constitution seems fit to unite legislative and judicial powers in a single hand, there is nothing to hinder, so far as the Constitution of the United States is concerned." See also *Dreyer v. Illinois* (187 U.S. 713).

³² Cf. Goodnow, *American Administrative Law*, p. 35.

These provisions interpreted in the light of the accepted doctrines that each and all of the Federal organs of government possess only those powers granted them by the Constitution, and that the powers not granted may not by them be delegated to other and different organs, have, from the beginning, been held to secure what the specific distributing clauses in the State Constitutions are designed to provide. In the case of *Kilbourn v. Thompson*³³ the court said: "It is believed to be one of the chief merits of the American system of written constitutional law that all powers intrusted to the government, whether state or national, are divided into the three grand departments, the executive, the legislative and the judicial; that the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of that system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of the system that the persons intrusted with the power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no others."³⁴

To preserve the separation of powers and to render government efficient for the protection of civil liberty, the framers of our Federal and State Constitutions saw that it was necessary not simply to create separate depositaries for the three powers, but to provide means for preventing, if possible, the control by one department of the other departments. With this end in view the executive, legislative and judicial establishments were made as independent as possible of one another. Thus the legislatures are made the sole judges as to the constitutional qualifications of those claiming membership, they have the power of disciplining and expelling members, their members are in general not liable to arrest except for felony, treason or breach of the peace, and they may not be held responsible in actions of slander or libel for words spoken or printed by them as members. The independence of the courts is in general secured by tenures of office, and official compensation free from legislative control, and, furthermore, they have the great power of declining to enforce all laws or executive acts which they hold to be unconstitutional or otherwise illegal. The executive has, of course, within his own hands, the material force of the State, and within the limits of the discretion placed by law within his hands, may not be held legally responsible in the courts for his acts.

§ 1061. Separation of Powers Not Complete.

While, as has been said, the principle of the separation of powers has generally been accepted as binding in our systems of constitutional jurisprudence—State and National—the practical necessities of efficient government have prevented its complete application. From the beginning it has been necessary to vest in each of the three departments of government certain powers which, in their essential nature, have not belonged to it. Thus, to mention only a few of the more evident examples, the courts have been given the essentially legislative power to establish rules of practice and procedure, and the executive power to appoint certain officials—sheriffs, criers, bailiffs, clerks, etc.; the executive has been granted the legislative veto power, and the judicial right of pardoning; the legislature has been given the judicial powers of impeachment, and of judging of the qualifications of its own members, and the Senate, the essentially executive power of participating in the appointment of civil officials.

Not only this, but as we shall later see, the principle of the separation of powers does not prevent the legislative delegation to executive officers of both a considerable ordinance-making power, and an authority to pass, with or without an appeal to the courts, upon questions of fact. Essentially, the promulgation of administrative orders or ordinances is legislative in character, and the determination of facts after a hearing is judicial. In both cases, however, these functions are performed in pursuance of statutory authority, and as incidental to the execution of law. In like manner, the legislature is conceded to have, as incidental to its law-making power, the essentially judicial function of punishing for contempt in certain classes of cases. It should, perhaps, be observed that inquiries as to the essential or inherent nature of specific powers are of so speculative a character that the courts in many cases have preferred to seek

³³ 103 U.S. 168.

³⁴ The principle of the separation of powers does not limit Congress when providing governments for the Territories, for, as to this, Congress has complete discretion.

the guidance of historical precedent or of considerations of political expediency rather than the conclusions to be reached by pure reason. At times, however, the courts have been compelled to rely upon this last source for their determinations.

§ 1062. The General Principle Stated.

Thus, it is not a correct statement of the principle of the separation of powers to say that it prohibits absolutely the performance by one department of acts which, by their essential nature, belong to another. Rather, the correct statement is that a department may constitutionally exercise any power, whatever its essential nature, which has, by the Constitution, been delegated to it, but that it may not exercise powers not so constitutionally granted, which, from their essential nature, do not fall within its division of governmental functions, unless such powers are properly incidental to the performance by it of its own appropriate functions.

From the rule, as thus stated, it appears that in very many cases the propriety of the exercise of a power by a given department does not depend upon whether, in its essential nature, the power is executive, legislative or judicial, but whether it has been specifically vested by the Constitution in that department, or whether it is properly incidental to the performance of the appropriate functions of the department into whose hands its exercise has been given.

Generally speaking, it may be said that when a power is not peculiarly and distinctively legislative, executive or judicial, it lies within the authority of the legislature to determine where its exercise shall be vested.

Despite some recent blurring of the functional lines established by the Framers, notably in the area of the correlative proposition of non-delegable powers, the concept remains fundamental to the U.S. Constitutional scheme of things. Thus, as recently as January 26, 1976, in the case of *Buckley v. Valeo*, 424 U.S. 1, 120, 123, 124, the Supreme Court, per curiam, stated as follows:

* * * Our inquiry of necessity touches upon the fundamental principles of the Government established by the Framers of the Constitution, and all litigants and all of the Courts which have addressed themselves to the matter start on the common ground in the recognition of the intent of the Framers that the powers of the three great branches of the national Government be largely separate from one another.

* * * * *

This Court has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decisions of cases or controversies properly before it * * *.

* * * * *

The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787. Article I, § 1, declares: "All legislative Powers herein granted shall be invested in a Congress of the United States." Article II, § 1, vests the executive power "in a President of the United States of America," and Art. III, § 1 declares that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The further concern of the Framers of the Constitution with maintenance of the separation of powers is found in the so-called "Ineligibility" and "Incompatibility" Clauses contained in Art. I, § 6:

No Senator or Representatives shall during the Time for which he was elected be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

It is clear from the foregoing that the separation of powers is "not simply an abstract generalization" but a fundamental principle of American constitutional jurisprudence. Moreover, the principle lies at the heart of Article I, § 6, cl. 2, which would be effectively, though not

totally, overridden by the Reuss proposal to permit Members to fill designated Executive Offices while at the same time continuing to serve as Members of Congress. Since the proposal is in the form of an amendment to the Constitution, it does not raise a narrow question of constitutionality in the usual form occasioned by a statute. In *Buckley v. Valeo*, for example, separation of powers was the guiding principle in resolving an issue arising under the Appointments Clause (Article II, § 2, cl. 2). Thus, after noting the various provisions of the Constitution which evidenced "the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another," the Court stated:

It is in the context of these cognate provisions of the document that we must examine the language of Art. II, § 2, cl. 2, which appellants contend provides the only authorization for appointment of those to whom substantial executive or administrative authority is given by statute. 424 U.S. at 120, 124.

In *Buckley v. Valeo*, the Court ruled that the manner of appointment (designation by congressional officers and approval by both Houses) of the voting members of the Federal Election Commission to which primary and substantial responsibility was given for administration and enforcement of the Federal Election Campaign Act of 1971, 86 Stat. 3, as amended, 88 Stat. 1263, was unconstitutional.

Rather than a relatively narrow issue of constitutional moment, the proposal under consideration poses a broader constitutional political one going to one of the great structural principles of American constitutional law. Ultimately the question posed by the measure is that of the continued relevance of the degree of separation of governmental powers conceived by the Framers. The answer to this question, in turn, begs answers to a host of subsidiary questions. Crucial among these, or so it seems, is whether the problems sought to be addressed by adoption of the proposed constitutional change either originate in or stem from the separation of powers and can be surmounted by not insignificant inroads on the principle; or, whether such problems have their origins in other sources, thus, calling for a different and perhaps less drastic "cure". While the purpose of this paper is to bring to light some of the major issues raised by the Reuss proposal it may be noted that Article I, § 6, cl. 2, does not create a permanent bar to the appointment of Members to Executive Offices. The Ineligibility Clause imposes a temporary bar, perhaps even less temporary than dreamt of by the Framers in light of the Knox and Saxbe precedents whereby the emoluments portion of the Ineligibility Clause restriction was obviated in advance of the elected office holder's term by legislatively reducing the salary of the office in question to its former level. The Incompatibility Clause is a permanent bar only insofar as it prevents simultaneous or concurrent service in both political branches.

The concerns that prompted the Framers to erect a tripartite governmental structure may seem less immediate today. In addition to remoteness, at least with respect to our own immediate historical experience, there are numerous examples of parliamentary governments, conspicuously the English form, which combine legislative, executive, and judicial powers in Parliament without apparent risk of autocracy so apprehended by the men of Philadelphia. However, these were sub-

stantial fears almost two hundred years ago and there seemed to be a wealth of historical experience to support them.

As noted, the Framers regarded the checks and balances that they had built into the Federal Constitution as self-executing safeguards against encroachment or aggrandizement of one branch at the expense of the other. In Madison's words:

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displaced in all the subordinate distributions of power, where the constant aim is to divide and arrange several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State. *The Federalist* No. 51.

The relevance and the immediacy of these original concerns will have to be weighed in assessing the merits of the proposal.

More is "woven" into Article I, § 6, cl. 2 than the separation of powers principle, however. Apprehensions over the adverse consequences flowing from the amalgamation of power were buttressed by a desire to guard against venality. As explained by Story:³⁵

The reasons for excluding persons from offices, who have been concerned in creating them, or increasing their emoluments, are to take away, as far as possible, any improper bias in the vote of the representative, and to secure to the constituents some solemn pledge of his disinterestedness. The actual provision, however, does not go to the extent of the principle; for his appointment is restricted only "during the time, for which he was elected;" thus leaving in full force every influence upon his mind, if the period of his election is short, or the duration of it is approaching its natural termination. It has sometimes been a matter of regret, that the disqualification had not been made co-extensive with the supposed mischief; and thus have for ever excluded members from the possession of offices created, or rendered more lucrative by themselves.³⁶ Perhaps there is quite as much wisdom in leaving the provision, where it now is.

It is not easy, by any constitutional or legislative enactments, to shut out all, or even many of the avenues of undue or corrupt influence upon the human mind. The great securities for society—those, on which it must for ever rest in a free government—are responsibility to the people through elections, and personal character, and purity of principle. Where these are wanting, there never can be any solid confidence, or any deep sense of duty. Where these exist, they become a sufficient guaranty against all sinister influences, as well as all gross offences. It has been remarked with equal profoundness and sagacity, that, as there is a degree of depravity in mankind, which requires a certain degree of circumspection and distrust; so there are other qualities in human nature, which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher form, than any other.³⁷ It might well be deemed harsh to disqualify an individual from any office, clearly required by the exigencies of the country, simply because he had done his duty.³⁸ And, on the other hand, the disqualification might operate upon many persons, who might find their way into the national councils, as a strong inducement to postpone the creation of necessary offices, lest they should become victims of their high discharge of duty. The chances of receiving an appointment to a new office are not so many, or so enticing, as to bewilder many minds; and if they are, the aberrations from duty are so easily traced, that they rarely, or never escape the public reproaches. And if influence is to be exerted by the executive for improper purposes, it will be quite as easy, and in its operation less seen, and less suspected, to give the stipulated patronage in another form, either of office, or of profitable employment, already existing. And even a general disqualification might be evaded by suffer-

³⁵ Story, 2 "Commentaries on the Constitution of the United States" at §§ 864, 865.

³⁶ Rawle on the Constitution, ch. 19. See 1 Tuck. Black. Comm. App. 375.

³⁷ *The Federalist*, No. 55.

³⁸ 2 Elliott's Debates, 279.

ing the like patronage silently to fall into the hands of a confidential friend, or a favourite child or relative. A dishonourable traffic in votes, if it should ever become the engine of party or of power in our country, would never be restrained by the slight network of any constitutional provisions of this sort. It would seek, and it would find its due rewards in the general patronage of the government, or in the possession of the offices conferred by the people, which would bring emolument, as well as influence, and secure power by gratifying favourites. The history of our state governments (to go no farther) will scarcely be thought by any ingenuous mind to afford any proofs, that the absence of such a disqualification has rendered state legislation less pure, or less intelligent; or, that the existence of such a disqualification would have retarded one rash measure, or introduced one salutary scruple into the elements of popular or party strife. History, which teaches us by examples, establishes the truth beyond all reasonable question, that genuine patriotism is too lofty in its honour, and too enlightened in its object, to need such checks; and that weakness and vice, the turbulence of faction, and the meanness of avarice, are easily bought, notwithstanding all the efforts to fetter, or ensnare them.

In the matter of the Incompatibility Clause, Story provides the following fulsome exposition of the relevant pros and cons: ³⁹

The other part of the clause, which disqualifies persons holding any office under the United States from being members of either house during their continuance in office, has been still more universally applauded; and has been vindicated upon the highest grounds of public policy. It is doubtless founded in a deference to state jealousy, and a sincere desire to obviate the fears, real or imaginary, that the general government would obtain an undue preference over the state governments.⁴⁰ It has also the strong recommendation, that it prevents any undue influence from office, either upon the party himself, or those, with whom he is associated in legislative deliberations. The universal exclusion of all persons holding office is (it must be admitted) attended with some inconveniences. The heads of the departments are, in fact, thus precluded from proposing, or vindicating their own measures in the face of the nation in the course of debate; and are compelled to submit them to other men, who are either imperfectly acquainted with the measures, or are indifferent to their success or failure. Thus, that open and public responsibility for measures, which properly belongs to the executive in all governments, and especially in a republican government, as its greatest security and strength, is completely done away. The executive is compelled to resort to secret and unseen influence, to private interviews, and private arrangements, to accomplish its own appropriate purposes; instead of proposing and sustaining its own duties and measures by a bold and manly appeal to the nation in the face of its representatives. One consequence of this state of things is, that there never can be traced home to the executive any responsibility for the measures, which are planned, and carried at its suggestion. Another consequence will be, (if it has not yet been,) that measures will be adopted, or defeated by private intrigues, political combinations, irresponsible recommendations, and all the blandishments of office, and all the deadening weight of silent patronage. The executive will never be compelled to avow, or to support any opinions. His ministers may conceal, or evade any expression of their opinions. He will seem to follow, when in fact he directs the opinions of congress. He will assume the air of a dependent instrument, ready to adopt the acts of the legislature, when in fact his spirit and his wishes pervade the whole system of legislation. If corruption ever eats its way silently into the vitals of this republic, it will be, because the people are unable to bring responsibility home to the executive through his chosen ministers. They will be betrayed, when their suspicions are most lulled by the executive, under the disguise of an obedience to the will of congress. If it would not have been safe to trust the heads of departments, as representatives, to the choice of the people, as their constituents, it would have been at least some gain to have allowed them a seat, like territorial delegates, in the house of representatives, where they might freely debate without a title to vote. In such an event, their influence, whatever it would be, would be seen, and felt, and understood, and on that account would have involved little danger, and more searching jealousy and opposition; whereas, it is now secret and silent, and from that very cause may become overwhelming.

³⁹ Id at §§ 865–869.

⁴⁰ See Rawle on the Constitution, ch. 19; The Federalist, No. 56.

One other reason in favor of such a right is, that it would compel the executive to make appointments for the high departments of government, not from personal or party favourites, but from statesmen of high public character, talents, experience, and elevated services; from statesmen, who had earned public favour, and could command public confidence. At present, gross incapacity may be concealed under official forms, and ignorance silently escape by shifting the labours upon more intelligent subordinates in office. The nation would be, on the other plan, better served; and the executive sustained by more masculine eloquence, as well as more liberal learning.

In the British parliament no restrictions of the former sort exist, and few of the latter, except such as have been created by statute.⁴¹ It is true, that an acceptance of any office under the crown is a vacation of a seat in parliament. This is wise; and secures the people from being betrayed by those, who hold office, and whom they do not choose to trust. But generally, they are re-eligible; and are entitled, if the people so choose, again to hold a seat in the house of commons, notwithstanding their official character.⁴² The consequence is, that the ministers of the crown assume an open public responsibility; and if the representation of the people in the house of commons were, as it is under the national government, founded upon a uniform rule, by which the people might obtain their full share of the government, it would be impossible for the ministry to exercise a controlling influence, or escape (as in America they may) a direct palpable responsibility. There can be no danger, that a free people will not be sufficiently watchful over their rulers, and their acts, and opinions, when they are known and avowed; or, that they will not find representatives in congress ready to oppose improper measures, or sound the alarm upon arbitrary encroachments. The real danger is, when the influence of the rulers is at work in secret, and assumes no definite shape; when it guides with a silent and irresistible sway, and yet covers itself under the forms of popular opinion, or independent legislation; when it does nothing, and yet accomplishes every thing.

Such is the reasoning, by which many enlightened statesmen have not only been led to doubt, but even to deny the value of this constitutional disqualification. And even the most strenuous advocates of it are compelled so far to admit its force, as to concede, that the measures of the executive government, so far as they fall within the immediate department of a particular officer, might be more directly and fully explained on the floor of the house.⁴³ Still, however, the reasoning from the British practice has not been deemed satisfactory by the public; and the guard interposed by the constitution has been received with general approbation, and has been thought to have worked well during our experience under the national government.⁴⁴ Indeed, the strongly marked parties in the British parliament, and their consequent dissensions have been ascribed to the non-existence of any such restraints; and the progress of the influence of the crown, and the supposed corruptions of legislation, have been by some writers traced back to the same original blemish.⁴⁵ Whether these inferences are borne out by historical facts, is a matter, upon which different judgments may arrive at different conclusions; and a work, like the present, is not the proper place to discuss them.

The measure under consideration is advanced as a means of resolving stalemate between the political branches by allowing Congress to participate in administrative decisionmaking. Any such stalemate, however, was not unanticipated but the price deliberately paid for the prevention of tyranny. This idea was succinctly summarized in Brandeis' observation that

The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction

⁴¹ See 1 Black. Comm. 175, 176.

⁴² 1 Black. Comm. 175, 176, Christian's note, 39.

⁴³ Rawle on the Constitution, ch. 19, p. 187.

⁴⁴ Mr. Rawle's remarks in his Treatise on Constitutional Law (ch. 19), are as full on this point, as can probably be found. See also The Federalist, No. 55; 1 Tucker's Black. Comm. App. 198, 214, 215; 2 Elliott's Debates, 278, 279, 280, 281, 282; 1 Wilson's Law Lect. 446 to 449.

⁴⁵ 1 Wilson's Law Lect. 446 to 449.

incident to the distribution of the governmental powers among three departments, to save the people from autocracy. Dissenting, *Myers v. United States*, 272 U.S. 52, 293 (1926).

That the proposal has significant implications on the separation of powers principle and the system of checks and balances seems fairly clear. It also raises a number of other thorny issues of philosophical, legal and practical magnitude. Some of these problem areas were noted by Congressmen Reuss in the aforementioned press release as follows:

Could Members of Congress, now subject to discipline and expulsion only by the House in which they sit, be impeached, a process from which they are now exempt? To whom would the federal Officer/Member of Congress owe his first loyalty—to the President who appointed him, or to his constituency and House of Congress? How would the proposed amendment work when the President and Congress were of different parties, or when the Senate and House controlled by different parties? What effect would the assumption of Executive Branch duties by a number of legislators have on the conduct of legislative business, including quorums? Should there be a limit on the number of members of each House who can be given Executive Branch appointments? Would the proposal improve or worsen "party discipline"?

Nor does the foregoing exhaust the list of questions associated with the proposal. Would the Senate and House leadership (President pro tempore, Speaker, etc.) be eligible for appointment to the designated offices? If they are, how would it effect the organization of each House and its ability to act? Could Members who are committee chairmen be expected to effectively discharge legislative and administrative duties? Would their appearance in Congress further erode (and simultaneously enhance the Executive in its role) as the originator of legislative ideas? Would Officer/Members of Congress be allowed to sit on impeachments and any consequent trials of administrative colleagues or the even more egregious situation of the President to whom they owe their appointment? Should persons in these circumstances be allowed to participate in congressional consideration of presidential vetoes of legislation? Should they be allowed to vote on legislation relating to matters that affect them in their administrative roles? As indicated, all Civil Officers are subject to removal from office by impeachment and trial; the Congress in an early case involving Senator Blount of Tennessee established that Members are not Civil Officers within the meaning of the Impeachment Clause. As a consequence would a Officer/Member of Congress who is impeached or dismissed from Executive Office be subject to expulsion for acts not relating to his or her legislative duties contrary to existing precedents? Would the conflict of interest provisions of the Federal Criminal Code be deemed to be an enlargement or additional qualification for elective Federal Office in the case of Office/Member of Congress? In the event of appointment to positions covered by the Hatch Act could they participate in political campaigns including Presidential campaigns? If so what would be the effect of such campaigning on their congressional duties and relationships? Would such activities contribute to the stalemate sought to be remedied by adoption of the proposed amendment? Would or should Members serving in Cabinet level posts be eligible to succeed to the Presidency under the current law dealing with vacancies in the Nation's premier elective constitutional offices? Does the term Executive Office include or exclude so-called regulatory agencies? Dismissal from such offices under both statutory and deci-

sional authorities is only for cause. Would Officer/Members of Congress be bound by executive privilege? Could they be subpoenaed by congressional committees as would be the case with their purely executive counterparts?

While answers to some of these questions may be gleaned by examining countries where parliamentary practices prevail, recourse to this source will not resolve all of them. This results because adoption of the proposal under consideration would create a hybrid combining elements of the American and parliamentary forms. To this extent, attendant consideration of its relative merits will entail speculative inquiry since first or even second hand experience would seem to be lacking. Of course, similar uncertainty surrounded the Framers' deliberations at Philadelphia where they supposedly met to "patch up" the Articles of Confederation. Their scheme of representative government as outlined in the Constitution was an experiment totally without precedent at the time. That the product of their deliberations insofar as the form and structure of the government are concerned has remained essentially unchanged despite the passage of almost two hundred years would doubtless surprise at least some of their number. That they "wrought better than they knew", however, seems more a tribute to their statesmanship and knowledge of history rather than blind luck. Accordingly, novelty and the absence of precedent are not in and of themselves persuasive arguments against change; however, they signal the need for caution and statesmanship and sensitivity for the past in addressing and resolving the foregoing questions and others still to be perceived.

Following upon a consideration of separation of powers and checks and balances, the next major area for inquiry would seem to be the proposal's implications on the Officer/Member of Congress' loyalty and accountability. Congressman Reuss acknowledges as much by raising at the outset the question "To whom would the federal Officer/Member of Congress owe his or her first loyalty—to the President who appointed him, or to his or her constituency and House of Congress?"

The Bible asserts and human experience amply supports the view that no man can serve two masters. Both the theory of representative government and constitutional requirements implementing that theory acknowledge that a Member's primary obligation is to represent the people. The latter finds support in the manner and frequency of election, the requirement of inhabitancy, the recognition of the people both as the source and the ultimate reserve of power. Article I, § 2, cl. 1 provides that "The House of Representatives shall be composed of Members chosen * * * by the People of the several States * * *." Similarly, cl. 1 of the Seventeenth Amendment provides for "two Senators from each State, elected by the people thereof * * *." In the words of *The Federalist*, No. 52: "As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration should have an immediate dependence on, and an intimate sympathy with, the people."

On the principle of representation, particularly as applied to the House of Representatives under the original Constitution, Story observes as follows:⁴⁶

⁴⁶ "Commentaries on the Constitution of the United States" §§ 572, 574.

The American people had long been in the enjoyment of the privilege of electing, at least, one branch of the legislature; and, in some of the colonies, of electing all the branches composing the legislature. A house of representatives under various denominations, such as a house of delegates, a house of commons, or, simply, a house of representatives, emanating directly from, and responsible to, the people, and possessing a distinct and independent legislative authority, was familiar to all the colonies, and was held by them in the highest reverence and respect. They justly thought, that as the government in general should always have a common interest with the people, and be administered for their good; so it was essential to their rights and liberties, that the most numerous branch should have an immediate dependence upon, and sympathy with, the people.⁴⁷ There was no novelty in this view. It was not the mere result of a state of colonial dependence, in which their jealousy was awake to all the natural encroachments of power in a foreign realm. They had drawn their opinions and principles from the practice of the parent country. They knew the inestimable value of the house of commons, as a component branch of the British parliament; and they believed, that it had at all times furnished the best security against the oppressions of the crown, and the aristocracy. While the power of taxation, of revenue, and of supplies, remained in the hands of a popular branch, it was difficult for usurpation to exist for any length of time without check; and prerogative must yield to that necessity, which controlled at once the sword and the purse. No reasoning, therefore, was necessary to satisfy the American people of the advantages of a house of representatives, which should emanate directly from themselves; which should guard their interests, support their rights, express their opinions, make known their wants, redress their grievances, and introduce a pervading popular influence throughout all the operations of the government. Experience, as well as theory, had settled it in their minds, as a fundamental principle of a free government, and especially of a republican government, that no laws ought to be passed without the co-operation and consent of the representatives of the people; and that these representatives should be chosen by themselves without the intervention of any other functionaries to intercept, or vary their responsibility.⁴⁸

* * * * *

We accordingly find, that in the section under consideration, the house of representatives is required to be composed of representatives chosen by the people of the several states. The choice, too, is to be made immediately by them; so that the power is direct; the influence direct; and the responsibility direct. If any intermediate agency had been adopted, such as a choice through an electoral college, or by official personages, or by select and specially qualified functionaries *pro hac vice*, it is obvious, that the dependence of the representative upon the people, and the responsibility to them, would have been far less felt, and far more obstructed. Influence would have naturally grown up with patronage; and here, as in many other cases, the legal maxim would have applied, *causa proxima, non remota, spectatur*. The select body would have been at once the patrons and the guides of the representative; and the people themselves have become the instruments of subverting their own rights and power.

In the words of the majority of the Court in *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). "Legislators represent people, not trees or acres."

The Constitution requires as a qualification for the election of Senators and Representatives that they be inhabitants of the states from which they are elected. The reason behind this requirement in the case of Members of the House of Representatives "was to secure an attachment to and a just representation of the interests of the state in the national councils. . . ." "The persons, who shall be elected representatives, must have all the inducement to fidelity, vigilance, and a devotion to the interests of the people, which can possibly exist." Story, 2 "Commentaries on the Constitution of the United States" §§ 618, 663. In the case of Senators, the requirement of inhabitancy was explained

⁴⁷ The Federalist, No. 52; 1 Black, Comm. 158, 159; Paley's Moral Philosophy, B. 6, ch. 7; 1 Wilson's Law Lect. 429 to 433; 2 Wilson's Law Lect. 122 to 132.

⁴⁸ 1 Tucker's Black. Comm. App. 28.

as being "manifestly proper, that a state should be represented by one, who, besides an intimate knowledge of all its wants and wishes, and local pursuits, should have a personal and immediate interest in all measures touching its sovereignty, its rights, or its influence." *Id.* at § 729.

Similarly, the peoples' representatives owe a duty of fidelity to the House to which they are elected, a duty flowing from the nature of their representation and reinforced by the principle of separation of powers. Breaches of that duty may be punished by each House up to and including expulsion therefrom. Article I, § 5, cl. 2.

Understandably, administrative officers' primary loyalties lie elsewhere, principally to the head of administration and chief law enforcer: the President. The basis of such loyalty is not simply an obligation owing to the appointing authority but entails broader consideration flowing from the President's duty of faithful execution of the laws and the need to pinpoint responsibility. The members of the Cabinet are the President's chief assistants and advisers. It follows from this status together with the President's responsibility to faithfully execute the laws that these officers are subordinate to him and to his policies. As argued by Madison in the House in 1789 on the location of the removal power, "the intention of the Constitution, expressed especially in the faithful execution clause, that the first magistrate should be responsible for the executive department", and this responsibility, he held, carried with it the power to "inspect and control" the conduct of subordinate executive officers. "Vest," he said, "the power [of removal] in the Senate jointly with the President, and you abolish at once the great principle of unity and responsibility in executive department, which was intended for the security of liberty and the public good." 1 *Annals of Congress* 495, 499 (1789).

The relative free hand given to the President in the choice of his Cabinet makes it possible to hold him responsible for the administration of the Executive Branch. The question arises whether the President can be held to such a responsibility when he is effectively denied such choice or the objects of such choice have obligations flowing in different directions.

The proposal to permit Members to serve simultaneously in the Executive Branch and the manner in which it is proposed to be implemented call for careful examination in both these regards. As noted, its adoption would not obligate the President to ultimately appoint any Members to Executive Offices. Its very existence may conduce to such a result, however. Moreover, the fact that the President would have to run his prospective nominees—both Member and non-member nominees—through the Congress twice may be an inhibiting factor in the exercise of an unfettered choice. The device of the preliminary screening list may afford the occasion for one House—particularly if that House is in the control of a party different from that of the President—to influence the selection of persons who are appointed to high administrative office.

In the case of Executive Officers who are also sitting Members, the conflict that may result from mutual and not necessarily consistent responsibilities is something more than an academic or abstract possibility. In matters of legislation generally, should he or she vote with

his representational interest or side with the administration of which he or she would be a part? Should a Member in these circumstances have a voice in his or her own selection to Executive Office or in the selection of prospective administrative colleagues? Should he or she be allowed a hand in policy origination and policy execution in matters affecting his or her department or those of other Executive Officers on the administration "team"? Does this dual legislative/administrative role raise questions relative to impeachment or a trial on articles of impeachment? In a contest between the political branches for information involving his or her area of administration, should an Officer/Member of Congress support the legislature's need to know or respect an invocation of Executive privilege? Would a setback or reversal in one area of responsibility have adverse consequences or impair his or her ability to operate effectively in the other?

All of these problems give rise to the argument that adoption of the proposal because of these and other attendant complications would magnify the asserted stalemate between the political branches that it is intended to remedy.

Moreover, there is the possibility that the presence of administrative officers in legislative councils may further erode the Congress' ability to initiate policies and programs. In the view of some scholars, Congress in recent times has, for various reasons, been more of an actor on presidential initiatives than a source of new ideas. It is not beyond expectation that this trend could be exacerbated with administration spokesmen participating in committee and floor deliberations. That their broadened perspective and influence may affect the legislative outcome in favor of an administration cannot be lightly dismissed. To this extent, Congress' policy origination role, if scholarly assessment of its recent decline are correct, may be aggravated further.

On the other hand, many if not all of these difficulties can be surmounted or, at least, partially defused in a variety of ways. It is not unknown—indeed House and Senate rules require—that a member stand aside in matters where legislative and other interests cross one another. Moreover, the enlarged jurisdiction of Officer/Members of Congress gives them a broader perspective from which to view areas of legislative-executive conflict and to persuade one or the other, or both sides, of their respective, relative merits. In this respect, both Congress and the Executive may benefit from this broader perspective which, in turn, may heighten mutual respect and enhance the opportunities for mutual give and take and compromise.

As indicated, by bringing Members into closer and more frequent contact with the heads of departments, the Congress would become better informed of the needs of these departments. The latter, in turn, would have a greater awareness of and sympathy for the desires of Congress. Officers/Members of Congress would furnish leaders in Congress to spearhead legislation recommended by the President.

Adoption of the proposed constitutional amendment presages significant changes not only between the two political branches but in procedures within each branch. This latter seems to be particularly true with respect to Congress.

If, as Corwin has observed, the President and, by definition, the Executive Branch, must of necessity always be ready for action adop-

tion of the proposed constitutional change will require modification of existing procedures in order to permit the upper reaches of an administration to be flushed out in fairly short order. At present, appointments to top administrative positions are among the first order of senatorial business after the inauguration of a President. More or less similar dispatch invariably attends executive nominations at other times. Generally, the process is measurably facilitated "By [the] well-established custom [whereby] the Senate accords the President wide latitude in the selection of the members of his Cabinet, who are regarded as his chief assistants and advisers. It is recognized that unless he is given a free hand in the choice of his Cabinet he cannot be held responsible for the administration of the executive branch." Harris, "The Advice and Consent of the Senate" 259 (1953).

The proposal's establishment of a bifurcated or two stage appointment process in the case of Cabinet and sub-Cabinet offices affords greater opportunities for delay in fashioning an administration. Moreover, the proposed involvement of both Houses, not simply the Senate, may have the tendency to further prolong the process. The fact that the appointment process proposed by the measure would operate every two years—apparently to cope with changes in Cabinet and sub-Cabinet positions brought on by defeats at the polls of Officer/Members of Congress—may compound this and associated problems. Delays of this nature, which in normal times can impede an administration's effective operation, could import graver consequences in times of military or economic crises. Accordingly, procedures may have to be devised which will favor expeditious but, at the same time, effective congressional scrutiny of executive nominations to the designated offices. One possibility may be to formalize procedures which would enable a President-elect to submit at least the en bloc list for congressional approval. This procedure, which finds some rough precedent in the Senate's handling of President-elect Carter's Cabinet nominations in 1977, would result in a newly inaugurated President's being more or less in the same position as his predecessors in the matter of appointments to high Executive Office. On the other hand, care must be exercised to avoid repetition of a Bert Lance affair; an affair in some measure brought on by undue haste in the consideration of the former OMB Director's nomination. Since normal Senate advice and consent procedures would come into play after congressional en bloc approval, it may be that expeditious consideration in the first of the two-stages may not lead to similar unfortunate incidents.

Both Houses would have to adopt procedures to take into account the proposed first stage. Although the development of such procedures should present no significant problems except for the time element (since each House will have to organize, choose its own leaders, and the like), this revised procedure represents a marked departure from tradition. This is particularly true with respect to the House of Representatives which has virtually no tradition in this regard save for the recent scrutiny of vice presidential nominees under procedures established in the Twenty-fifth Amendment.

Other congressional procedural changes depend largely on the degree of involvement or non-involvement of Officer/Members of Congress in the legislative process. In light of the heavy demands placed on

both Members and high level administrators in modern times, it is fairly safe to say that no single person can do justice to both activities at the same time. Common sense as well as the intent behind the proposed amendment suggest significant changes in legislative activities and procedures in order to accommodate successful Member performance of administrative duties. This may mean freeing-up Officer/Members of Congress from certain duties and responsibilities, for example, committee assignments, caucus participation, procedural votes, and the like. It may mean the provision of additional staff which would permit the substitution of alter egos to perform representational or other legislative activities to which the Officer/Member of Congress could no longer personally attend. Unless such a Member's representative capacity is to become a fiction, procedures will have to be modified in order to enable him or her to discharge certain essential obligations which cannot be delegated, such as voting on legislation. In this regard, Senate and House rules and procedures may have to be revised to permit proxy or absentee votes, scheduling specific times for final votes on diverse legislative matters, etc.

While denominated procedure, these and other related matters entail fundamental policy considerations of not inconsiderable moment. The rules and procedural changes ultimately adopted to facilitate implementation of the proposed constitutional amendment will reflect the judgment of both Houses in a great many vital particulars, including many not perceived at the moment.

As Congressman Reuss noted in his press release of July 23, 1979:

The proposed amendment involves an important modification of * * * constitutional principles * * * We will have to weigh carefully whether such modification is justified.

2. EFFECT OF PROPOSED CONSTITUTIONAL AMENDMENT ON CONDUCT OF LEGISLATIVE BUSINESS

(By Robert L. Tienken, Senior Specialist in American Public Law, the Library of Congress, Congressional Research Service)

Reference is made to your inquiry concerning the effect of your proposed constitutional amendment, under which the President would be authorized to nominate Members of Congress to fill up to fifty positions in the Executive Branch, on the conduct of legislative business.

The question has two aspects: the effect on procedures that are constitutionally mandated, and the effect on procedures that are discretionary, such as the rule-making power.

In the first category are the constitutional provisions that refer to numbers of Members or Senators; in the second category are other provisions.

The most significant constitutional provision is Art. I, sec. 5, cl. 1 " * * * and a majority of each (House) shall constitute a quorum to do business: ". In both Houses actual physical presence of the Members is necessary for ascertaining a quorum (see, Deschler's, Procedure in the House of Representatives, ch. 20; Floyd M. Riddick, Senate Procedure, pp. 630 et seq.). Consequently one more than one-half the Members of each House are required to be physically present if they are to be counted for a constitutional quorum. No rule or statute can modify this constitutional provision to enable Executive branch/ Members to be counted in a quorum unless they actually appear on the floor. The presence of such persons may not in reality be necessary for the counting of the constitutional totals. Perhaps quorums can be formed without them. But they will always be subject to call under the Constitution whenever the absence of a quorum is properly noted and a quorum call is made. Changes in the House rules in the last few Congresses have reduced the number of quorum calls that have to be made, but similar changes have not occurred in the Senate.

No proxy or other device can relieve the Members of this responsibility. In the event a quorum is not obtained the Constitution authorizes a smaller number than a quorum to compel the attendance of Members in such manner and under such penalties as each House may provide (Art. IX, sec. 5, cl. 1). It is arguable that under the rulemaking power (Art. I, sec. 5, cl. 2) it could be provided that Executive branch/ Members would be the last to be sought out and compelled to appear in order to form a quorum, but they cannot be relieved of such responsibility totally.

The number necessary for a quorum to do business in each House today is determined by the number of Members chosen, sworn and living whose membership has not been terminated by resignation or

by the action of the House (Hinds', *Precedents of the House of Representatives*, Vol. IV, secs. 2889, 2890; Cannon's *Precedents of the House of Representatives*, Vol. VI, sec. 638). Neither House uses the total number of possible Members as the figure from which to determine a majority. It is not possible, without a constitutional amendment, to change the number necessary for a quorum just as it is not possible to change the constitutional requirement that the approval of one-fifth of those present is necessary for a yea and nay vote (Art. I, sec. 5, cl. 3). The inclusion of the phrase in the proposed amendment that the Congress shall have the power to enforce the amendment by appropriate rules of procedure, as relevant and proper, does not necessarily grant authority to change the quorum requirement of Art. I of the Constitution. The requirement of a majority to constitute a quorum is a procedural clause but it is a constitutional procedure different entirely from the authority for each House to "determine the rules of its proceedings" (*supra*, sec. 5, ch. 2). The amendment does not refer to constitutional rules and consequently it is arguable that the constitutional quorum requirement cannot be changed under the proposed amendment.

Since both Houses recognize that for purposes of determining a question in that House a majority of those voting, a quorum being present, will suffice and voting means voting in person (see, Constitution—Art. I, sec. 5, cl. 3, yea and nay votes; House Rule I, (5) (a); Senate, Rule XII), persons who are Executive branch/Members cannot vote in the House by proxy or otherwise and no rule change can alter this situation. Instances where personal voting is required under the Constitution are for example: voting to impeach in the Senate by the concurrence of two-thirds of the Members present (Art. I, sec. 3, cl. 5); overriding Presidential vetoes (Art. I, sec. 7, cl. 2); concurrence in treaties by two-thirds of the Senators present (Art. II, sec. 2, cl. 12); confirming nominations by a majority of those voting in the Senate, a quorum being present (Art. II, sec. 2, cl. 2); proposing amendments to the Constitution by two-thirds vote of each House (Art. V); voting for the President in the House and for the Vice-President in the Senate (Amendment XII); confirmation of a nominee of the President for Vice-President by a majority vote in each House (Amendment XXV); and all other provisions in the Constitution where voting by Congress or the exercise of the legislative power is mentioned.

In several situations an Executive branch/Member need not vote, but in one of them such a person must be on the floor. House Rule VIII provides that each Member shall vote on each question put unless he has a direct personal or pecuniary interest in the event of such question. In the Senate, Rule XII, sec. 2, permits a Senator to decline to vote on a measure if the Senate accepts his explanation of personal private interest therein.

In both Houses live pairs can be formed and if an Executive branch/Member can join a live pair with a Member present on the floor during the vote he need not be present.

As respects committees, there is no constitutional provision concerning the use of proxies to provide a quorum. However, the Chair in the Senate has ruled that such is not in order (Riddick, *supra*, p. 248), and the House (Rule XI, cl. 2(f)) forbids the count of proxies for a quorum

in a committee. Arguably such rulings and rule can be changed but the change would effect a traumatic alteration in proceedings in both Houses. It would require, among other things, amendments to Senate Rule V which provides that no Senator shall absent himself from the service of the Senate without leave, and House Rule XXIII, sec. 2(a), which provides that if a quorum fails to appear during a call in the Committee of the Whole, the Committee shall rise and the Chairman shall report the names of the absentees to the House. To permit quorums to be formed in committees by means of proxies is a policy question. No instance has been found where such practice has been followed by either House.

Proxy voting in committee (except the Committee of the Whole in the House) is permitted by the Rules of the House (Rule XI, sec. 2, (f)) and in 2 U.S.C., sec. 190a (d) for the Senate, except that in both Houses proxies cannot be used to report out a measure. Thus, Executive branch/Members may cast most votes in committee by proxy if the committee rules so provide. The major change would be permitting proxy votes for the reporting out of measures. Another alteration could be in the rules in both Houses that require a majority to be present at a committee meeting when a vote is taken to go into executive session (House Rule XI, sec. 2(g); Senate Rule XXV, sec. 7 (b)).

Since there is no constitutional requirement as to quorums for doing business in committees the number of Members set by the rules of each House as constituting a quorum is subject to change and this includes, of course, the number required for a quorum in the Committee of the Whole in the House (see, House Rule XXIII, sec. 2(a)).

Other aspects of procedure have been mentioned elsewhere but do require consideration. For instance, could an Executive branch/Member vote to override or support a Presidential veto? Would there be a conflict of interests of sufficient magnitude to require a change in the rules to prohibit such action? In other words, can a Member be prevented from voting? As has been noted the rules of both Houses today provide for abstention from voting in certain instances. In the case of the House it is a voluntary act by the Member. In both Houses the exemption relates to private causes of the Member, not public. The power of the House to deprive one of its Members of the right to vote on any question is doubtful (Hinds', supra, Vol. V, sec. 5952; Cannon's, supra, Vol. VIII, sec. 3072). The tenet is particularly applicable where the Member is a member of a class which includes persons outside of Congress as well (ibid.). Here the class would be persons appointed by The President to Executive office, few of which would have a particular personal interest in the bill that had been overridden. Yet the conflict of interests is readily apparent and it cannot be said that rules or a statute could not be adopted preventing all such Members from voting on a question to override. Again it is a matter of policy.

The same kind of problem would arise in the case of Executive branch/Members voting in the Senate on a matter of impeaching the President who had appointed them. Such a situation could be differentiated however, on the ground that each such person would be acting in a judicial capacity rather than a political one and he swears to so act impartially (see, Senate Rules for Impeachment Trials).

In general, rules changes could be made to adapt the relationship of Executive branch/Members to the legislative procedure in numerous instances. These concern committees, committee quorums (except perhaps in the Committee of the Whole as regards being counted for a quorum). What could not be changed is the constitutional requirement for a quorum to do business, and, in all probability, to voting in person, and being counted in quorum calls. One way to mitigate the times of appearances on the floor by such persons would be to carry as far as might be reasonably proper, a reduction in quorum calls and, establishing a period at the end of each day for recorded or roll call votes.

3. CONSIDERATIONS REGARDING THE PROPOSED AMENDMENT'S IMPACT ON THE CONDUCT AND SIZE OF THE CONGRESS, AND CONGRESS' RELATION TO PARTY AND PRESIDENT

(By Richard C. Sachs, Analyst, Government Division, The Library of Congress, Congressional Research Service)

This analysis discusses four questions raised in a July 23, 1979, statement from the office of Representative Henry Reuss (D-Wisc.) concerning a proposed constitutional amendment that would permit Members of Congress to serve in executive branch offices. The four questions are:

1. How would the proposed amendment work when the President and Congress were of different parties, or when the Senate and the House were controlled by different parties?

2. What effect would the assumption of executive branch duties by a number of legislators have on the conduct of legislative business, including quorums?

3. Should there be a limit on the number of Members of each House who can be given executive branch appointments?

4. Would the proposal improve or worsen "party discipline"?

Two other questions were raised in the July 23 statement: Could Members of Congress, now subject to discipline and expulsion only by the House in which they sit, be impeached, a process from which they are now exempt? And, to whom would the Federal officer/Member of Congress owe his first loyalty—to the President who appointed him, or to his constituency and House of Congress? These questions are addressed by Raymond J. Celada, CRS Senior Specialist in American Public Law, in his memorandum of August 29, 1979.

The previous four questions will be considered consecutively. Please note that the following discussion is necessarily speculative.

1. HOW WOULD THE PROPOSED AMENDMENT WORK WHEN THE PRESIDENT AND CONGRESS WERE OF DIFFERENT PARTIES, OR WHEN THE SENATE AND THE HOUSE WERE OF DIFFERENT PARTIES?

Political Scientist Randall Ripley identified three general types of relationships between Presidents and parties and their leaders: the presidential majority, the congressional majority and the truncated majority.¹ While this question refers specifically to the problem of the truncated majority, one in which the majority of at least one House of Congress is controlled by the party in opposition to the President, a brief discussion of Congress-White House relations would seem helpful to clarify the issue.

¹ Ripley, Randall. *Congress ; Process and Policy*. New York, W. W. Norton, 1975, p. 236-244.

In a presidential majority, the president and the majorities of both houses of Congress are of the same party and the President views himself as the significant legislative leader. Some commentators have held that until the 95th and 96th Congresses, congressional leader-President relations in such a presidential majority have been characterized by cooperation. The "New Frontier" programs of John Kennedy and the "Great Society" of Lyndon Johnson have been cited as examples of such cooperation.² In earlier years, one recalls the 73d Congress in which President Franklin Roosevelt worked with large Democratic majorities to produce a great number of major laws. Observers frequently agree that critical to a number of the major successes of Roosevelt, Kennedy, and Johnson were their good relations with party leaders in and out of Congress and their personal roles in the bargaining process. The Carter presidency, while working with a Democratic majority in Congress, has been characterized as less successful than its predecessors in this regard.³ Critics have offered explanations for the administration's failure to take advantage of its congressional majority: decline of the role of party in congressional and presidential elections; Jimmy Carter as a Washington "outsider;" and the inability of the White House staff to establish good working relations with the congressional leadership.⁴ One may reason that the proposed amendment would be most successfully implemented in a situation where a strong President not only has party control of both Houses of Congress but also where there exists a spirit of cooperation and enlightened self-interest. It would seem that the incentive for cooperation would be enhanced by the dual role of a number of key congressional/cabinet leaders.

This was not the case, however, in the experience of former Rep. Brock Adams (D-Wash.), who left the House to serve as President Carter's Secretary of Transportation. Adams resigned in July 1979, reportedly because he was not a "team player" and had poor relations with senior presidential advisors.⁵ Prior to joining the Carter cabinet, Adams served as chairman of the House Budget Committee. As Transportation Secretary, Adams reportedly continued to enjoy a good working relationship with the Congress and was seen as one of the few senior Carter administration officials who was welcomed on Capitol Hill.⁶ Adams was said to have been frustrated by problems with the White House staff and by lack of administration support on major transportation issues, especially mass transportation.⁷

In Ripley's congressional majority, both Houses may share the same party, but the President allows Congress to largely determine legislative priorities. The congressional party leaders tend not to take the President as a serious legislative leader and to establish congressional priorities as national priorities. Presidents Harding and Coolidge were considered weak legislative leaders, and more recently, President Eisenhower in the case of the 83d Congress, where both Houses

² Ibid.

³ See, for example, *Washington Star*, Feb. 21, 1977: A1, A8. Also Merrill, F. T. *How Carter Stopped Playing Politics and Started Having Trouble with Congress*. *Washington Monthly*, July-Aug. 1977: 30.

⁴ Ibid.

⁵ Light, Larry. *Hill Takes Dim View of Carter Cabinet Purge*. *Congressional Quarterly*, July 21, 1979: 1431.

⁶ Ibid.

⁷ Clark, Timothy B. *What To Expect From Carter's New Cabinet*. *National Journal*, July 28, 1979: 1245-1246.

were narrowly held by the Republicans. Under such conditions the proposed amendment might engender conflict since, lacking strong executive leadership, congressional leaders might argue among themselves about who should be nominated for the executive branch positions. Or, a weak legislative President might seek to show a strong hand to the Congress by pressing for his nominees. On the other hand, if congressional leaders were successful in placing their choices in cabinet and sub-cabinet positions, the chief executive's influence might be further compromised. Neither situation would necessarily be unworkable.

In past cases of truncated majorities, Ripley observes that congressional leaders usually cooperate with the President on matters of foreign policy and oppose him on domestic issues. In the 80th Congress (1947-48), President Truman faced a Congress controlled by a Republican majority. While the conflict produced gains and losses for both sides, Truman's characterization of the 80th as a "do-nothing Congress" was seen to be politically useful. The 86th Congress (1959-1960), in which President Eisenhower faced one of the largest and strongest Democratic majorities in history, was effectively assailed for its record of non-achievement.⁸

The example of Melvin Laird, first a Republican Congressman from Wisconsin and then Richard Nixon's Secretary of Defense from 1969 to 1973, shows that the placement of a Congressman in a cabinet position can enhance an administration's relationship even in a truncated majority. Laird, the first professional politician ever named Defense Secretary, served 16 years in the House. Because of his thorough knowledge of Congress, Laird was able to foster a close working relationship between the Pentagon and the congressional committees that act on the military budget. In a 1972 assessment of Laird's career at the Pentagon, it was noted, "Playing on his intimate knowledge of constituent pressures on legislators, Laird defused the defense spending issue by reminding recalcitrant members of Congress of the unemployment they could expect in their districts in the event of deep cuts in the defense budget. His former colleagues on Capitol Hill were far more comfortable with Laird, one of their own, than they were with the aloof and professorial [Robert] McNamara [Secretary of Defense from 1961 to 1968]."⁹ Of Laird, F. Edward Herbert (D-La.) former chairman of the House Armed Services Committee said that the Secretary of Defense knew and allowed for the "shortcomings and foibles" of Congress and that he was a man the committee knew would never spring the "double-play" on them.¹⁰ Other Congressmen praised Laird for being "street wise" in the ways of Congress and noted that his "greatest asset has been to restore relations with Congress."¹¹

Nominations under the proposed amendment would probably suffer differently depending whether the President's party held the House, the Senate, or neither house. The common denominator would appear to be time; the amendment, no matter how great the cooperation be-

⁸ The 86th Congress is discussed in detail in Gordon, Glen, *The Legislative Process and Divided Government: A Case Study of the 86th Congress*, University of Massachusetts, Bureau of Government Research, 1966.

⁹ Laird: Heavy Impact as Defense Secretary, *Congressional Quarterly*, December 2, 1972: 3086.

¹⁰ *Ibid.*

¹¹ *Ibid.*, p. 3087.

tween Houses of Congress and the White House, has a potential to cause delays in the nomination process.

In the proposed amendment, following enactment of a measure setting forth which fifty offices Members would be eligible to fill, the President is to submit a single list of prospective nominees to both the House and Senate. Each House must separately agree to the entire list; after such agreement the President then nominates the individuals on the list to the designated offices and submits their names for Senate confirmation. It is reasonable to assume that congressional leaders will take part in the decisions that lead to the President's submission of the en bloc list. It is also reasonable to assume that individual Members and formal and informal congressional groups will mount lobbying campaigns to forward their chosen candidates for the executive positions. Hearings may have to be held in both Houses and reports written before the en bloc list may be approved. Then the nomination process begins again in the Senate.

In a situation where the President's party controls the House but not the Senate, the President faces the difficult prospect of first having the en bloc list approved and then having his nominees accepted again by the rival political party. What would happen, for example, if the en bloc list was accepted and the Senate then refused to confirm the nominee? What would happen if the House and Senate could not agree on an en bloc list? One alternative might be to set legislative deadlines for passage of the en bloc list.

In a situation where the President controlled neither House of Congress, the President would, naturally, wish to appoint Members of his own party, the congressional minority party, to executive office. Thus the majority party would be faced with approving Members of the minority to high office. Again, it seems reasonable to assume a high level of conflict in the process of making such decisions, comparable to that experienced by recent Republican nominations before Democratic Congresses.

2. WHAT EFFECT WOULD THE ASSUMPTION OF EXECUTIVE BRANCH DUTIES BY A NUMBER OF LEGISLATORS HAVE ON THE CONDUCT OF LEGISLATIVE BUSINESS, INCLUDING QUORUMS?

Before examining the potential effect of the proposed amendment on congressional business, it might be useful to briefly look at two important elements of congressional activity, service to the district and congressional workload. By observing how these elements presently affect the job of a Congressman, it may become more clear how potential conflicts could arise should the proposed amendment be enacted.

Political scientist Samuel C. Patterson notes that Congressmen have a strong incentive and built-in support systems to provide significant services to their district. Patterson describes the components of these incentives as follows:

1. Members are authorized to take a significant number of trips to their districts and they spend more time at home. In the early 1960's House Members were authorized to take three government-paid trips home annually; in 1977, the House authorization was increased to 33 round trips a year.

2. Over the years the mail has markedly increased. Incoming mail tripled between 1971 and 1977. In 1954, about 40 million pieces of

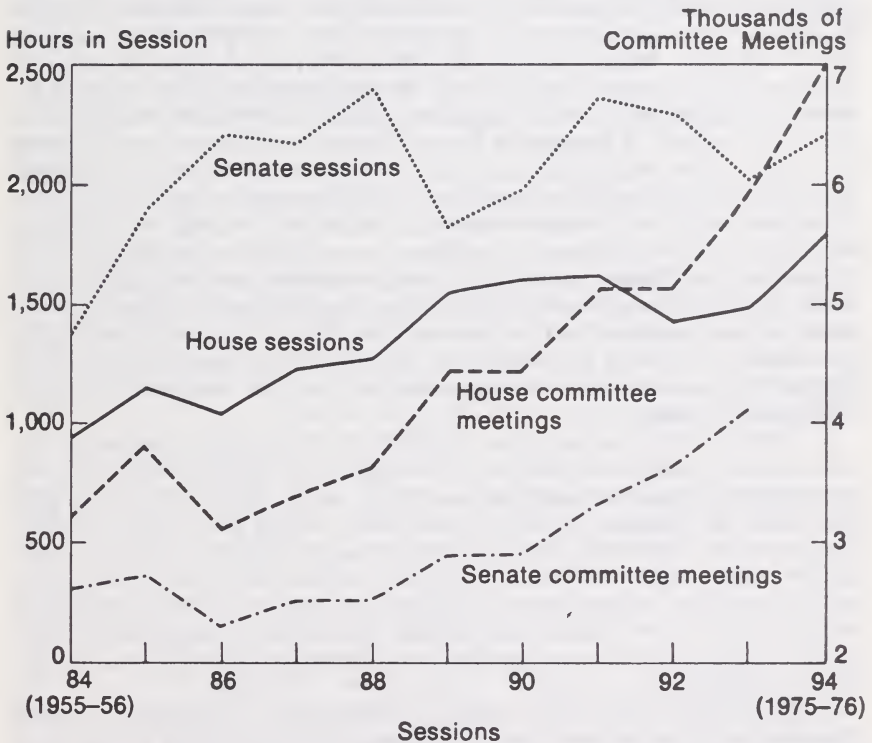
franked mail were sent out by the House and Senate; by 1970, the figure had grown to 200 million pieces.

3. Staffs have increased. In the early 1960's a House Member could have a staff of nine; today, a staff of 18 is authorized. Additionally, constituent services have increasingly moved out of the Washington offices and into the district offices.

4. Casework has expanded as the coverage of welfare laws and veterans' benefits have been enlarged, and as congressional offices have sought to play an "ombudsman" role in mediating disputes between government and constituents.¹²

Simply from the amount of time a congressman spends on constituent-related activities and problems it is possible to foresee conflicts of time and space should the congressman assume executive responsibilities. More generally, the significant growth of the congressional workload further elucidates this problem.

INCREASES IN CONGRESSIONAL ACTIVITY, 1955-1976



Source: U.S. Congress, House, Commission on Administrative Review, *Administrative Reorganization and Legislative Management*, vol. 1, H. Doc. 95-232, 95th Cong., 1st sess., 1977, p. 4; U.S. Congress, Senate, Commission on the Operation of the Senate, *Policy Analysis on Major Issues* (Washington, D.C., 1977), p. 6.

¹² Patterson, Samuel C. *The Semi-Sovereign Congress*. In King, Anthony, ed. *The New American Political System*. Washington, D.C., American Enterprise Institute, 1978. pp. 149-152.

As Patterson's graph shows, floor activity, committee and subcommittee meetings have escalated dramatically since the 1960's. In the 95th Congress, 347 House Members had two or more committee assignments and 257 Congressmen had four or more subcommittee assignments. The 1975 House Commission on Administrative Review (Obey Commission) and the Commission on the Operation of the Senate found that Members worked an average of eleven hours a day, that multiple committee assignments resulted in an overloaded legislative schedule, and that Members' days had become "long, fragmented, and unpredictable."¹³ Given the current state of congressional workload problems, the acceptance of major executive agency responsibilities would not alleviate what is seen by many as one of Congress' most serious internal issues.

To some extent, the effect on legislative business of a group of executive branch officials who are also Members would depend more on who they are, rather than how many there are. Members of the leadership and committee chairmen might find themselves in the unenviable position of taking a position, as an executive branch official, opposite of the one they would take as legislator. It is not difficult to imagine the conflict that would arise in the case of an appropriation subcommittee chairman who, in the role of agency head, must defend his agency's budget, and in his legislative role, might seek restraints on that same budget. It is possible that a Member would have to step down from his or her leadership/chairmanship position in order to assume an executive position. The question of sheer numbers would seem to be important only in extreme situations: what if 25 of the 50 positions mandated by the proposed amendment were filled by Senators? What if most of the House leadership became cabinet and sub-cabinet officials? In such cases it seems likely that legislative operations would suffer in two regards: lack of time and conflict of interest. These problems will be further developed in the following paragraphs which discuss the amendment as it might relate to major components of the legislative process.

1. *Drafting and introducing legislation.*—One might expect to see more agency-drafted legislation introduced as Member/officials seek to promote or balance congressional views with agency bills. It is possible that the number of bills introduced would grow significantly. On the other hand, the Member/official might limit his personal legislative activities to his area of administrative expertise and become less involved in other issues. Thus, the number of bills introduced might decline but with a consequent use in the complexity of the legislation given the more narrow concentration and expertise of the Member/official.

2. *Hearings.*—Under the rules of the House, a minimum of two Members must be present to take testimony; in the Senate at least one Senator must preside. It is not uncommon, due to scheduling conflicts and other commitments, that testimony is taken under these conditions. Poor attendance by Members at hearings has often been the subject of congressional criticism. Given the further time demand on Member/officials, the proposed amendment would not be likely to improve this situation.

¹³ In *Ibid.*, p. 160.

3. *Markup and other committee business.*—House and Senate rules allow the committees to set their own rules for constituting a quorum to markup legislation and do other business with the exception of reporting legislation, with the proviso that a quorum must constitute at least one-third of the membership of the committee. Attendance at committee meetings has also been the focus of criticism in recent years and, in cases where Member/officials sit on major committees the situation would probably be exacerbated if such individuals were absent attending to executive branch business. Absent Member/officials could cast votes by proxy in most cases, but such absentee participation in what is considered to be the core of the legislative process might also bring criticism.

At this stage there is the opportunity for conflicts of interest. What happens if the chairman of the Appropriations Committee is also Secretary of the Treasury? Could a chairman testify before his own committee as an executive branch witness? Would a Member/official aggressively question his agency deputies? How aggressively would a Member/official pursue investigative and/or oversight hearings involving his own agency, or the agency of a congressional colleague? On the other hand, the individual resolution of such conflicts by 50 key Member/officials might provide the vehicle necessary for improved executive-congressional cooperation. Such radical modification of past congressional behavior would assume a radically altered view by Members of their role and duties.

3. *Rules Committee action in the House.*—Scheduling legislation in the House Rules Committee presents another potential roadblock if the proposed amendment is enacted. A major House committee, its membership has a special relationship with the leadership and regulates the flow of legislation. It is likely that the Rules Committee, with members serving as Member/officials under the proposed amendment, would probably find itself facing constraints of time and conflict of interest that would almost certainly impede the process of bringing a bill to the floor if present attitudes were unchanged by the dual responsibilities of the Member/officials.

4. *Floor action.*—Floor absenteeism and time conflicts would also seem to be a problem. The House usually meets in the afternoons. How is a Member/official to find the time to attend floor debates and vote and at the same time carry on high-level executive agency business? Unlike parliamentary systems, our system places day-to-day management and policy responsibilities on cabinet officers, duties which would require a Member/official's presence elsewhere than Capitol Hill much of the time. One solution may be to schedule night sessions of the legislature as in Great Britain. Additionally, many Members, especially more senior Congressmen (and thus more likely to become Member/officials), pride themselves on their floor attendance record. Constituents apparently believe that one of the primary responsibilities of a Member is to be present and voting; perhaps constituents electing Member/officials would understand and feel compensated for a less impressive attendance record. Presently, voting by proxy is not permitted on the floor of the House or Senate, though absent Members may pair their votes and thus achieve the same end. Consideration might be given to instituting a form of proxy voting

for Member/officials, though the idea of proxy voting on the floor has been put forth in the past and has not been regarded with much enthusiasm.

Another practical consideration is staff size and space. A Member/official may feel he needs additional congressional staff to keep him informed on issues he will not have time to study. He may also feel that he should have agency staff located in offices on Capitol Hill to assist him with those responsibilities. As a result, staff functions may become increasingly complex and disperse.

3. SHOULD THERE BE A LIMIT ON THE NUMBER OF MEMBERS OF EACH HOUSE WHO CAN BE GIVEN EXECUTIVE BRANCH APPOINTMENTS?

The proposed amendment does not stipulate how the 50 executive branch positions are to be divided between the House and Senate. If this subject became an issue between the two Houses, presumably some sort of enabling legislation could resolve the differences. Both practical and political considerations would have to be regarded. It is possible that 50 Senators—half the Senate—could be named to agency positions. Such appointments would seem likely to cripple the Senate's ability to conduct business. Should the 50 appointments come from the House, the situation would be much the same—with the possibility that most of the House's leadership could be serving in a Member/official capacity, legislation would be subject to confusion and delay. From a practical point of view then, it would seem in the interest of both Houses to avoid making appointments that would excessively burden either the House or the Senate.

Politically, setting a limit would be equally difficult. Extra-legislative matters involving joint House-Senate representation, such as international conferences, commissions and the like, are often set by statute. However, the numbers involved are typically small. Attempting to apportion by statute this relatively large number of important agency positions would present substantial, but not necessarily impossible problems. Should the positions be apportioned equally, the House would have a maximum of 25 offices available for Members representing slightly more than 5 percent of the total House membership. The Senate, of course, would have 25 percent of its membership available for Member/official status. On the other hand, if the 50 positions were to be proportionally allotted, the House would get about eight positions for each one set aside for the Senate. The Senate might be unwilling to accept such representations.

Thus, the question of apportioning the executive branch positions might best be left to some informal method of conference or conciliation since individual merit other than House membership may be the primary consideration for nomination.

4. WOULD THE PROPOSAL IMPROVE OR WORSEN "PARTY DISCIPLINE"?

The proposed amendment empowers the President, and the President alone, with selecting and submitting to Congress the names of 50 individuals who may or may not be currently serving in the Congress to fill high level positions in the Executive Branch. The 50 positions, moreover, must be submitted "en bloc," and if either the House or the

Senate disapproves, a new list must be prepared at the White House and sent to Capitol Hill. This procedure adds an additional obstacle to the nominating process. Instead of appointing officials with the advice and consent of the Senate, the President would be required to satisfy both House and Senate and then begin the conventional nominating process.

A President imposes "party discipline" by using the powers of his office to maintain or enhance his position as titular head of his party, to insure that his administrative programs are carried forth, and to insure that the Members of Congress who belong to the President's party will support his legislative proposals whether or not the Members are in philosophical or ideological agreement. One may argue that the proposed amendment gives the President a powerful device for encouraging loyalty by enabling him to appoint Members of Congress whom he knows to be trustworthy to serve both legislative and executive functions.

On the other hand, the notion of "party discipline" in the contemporary Congress is in decline. The reasons for this decline are many and varied. They may be summarized as follows:

1. Party loyalty is in decline. Political Scientist Austin Ranney, citing data developed by the Center for Political Studies of the University of Michigan, notes a sharp drop between 1960 and 1976 in the proportion of adults describing themselves as identifying strongly with one of the parties, and a near doubling in the proportion of adults who express no party preference at all.¹⁴

2. Straight-ticket voting is in decline. Data show that in the 1960 presidential election, 65 percent of the voters reported casting ballots for all the candidates on their parties' ticket. In 1976, that figure fell to 33 percent.¹⁵

3. The Democratic Party's nominating system was changed in the late sixties and early seventies. Influence in presidential nominations has been lessened among party regulars and tends toward people committed, not necessarily to the party, but to an individual or policy.

4. The "Watergate reforms" of the 1970's and the passage of the Federal Election Campaign Act further weakened the national parties by creating a system where candidates, not parties, get the funds to run for election (notwithstanding the tax checkoff); where large contributions, once an important characteristic of party giving, are no longer permitted; and where strict accounting rules make for "arms-length" candidate-party relations.¹⁶

Thus, it can be seen that the President is more limited than ever before in making demands on members of his own party in Congress. As Ranney points out the components of the "presidential party" are significantly distinct from the components of the "congressional party," and as observers of the Carter presidency have noted, the current incumbent, though the beneficiary of the trends and rules which, in part, contributed to his election, has reaped the whirlwind in his relations with Congress.¹⁷

¹⁴ Ranney, Austin. "The Political Parties: Reform and Decline." In King. "The New American Political System." p. 219.

¹⁵ Ibid., p. 221.

¹⁶ Ibid., p. 244.

¹⁷ Ibid., p. 222.

Additionally, with respect to the proposed amendment, the President's power is checked by the "en bloc" nature of the nominations. The implicit role of the congressional leadership suggests that the President will have to counsel and bargain before his list is accepted. To the extent, then, that President and Congress agree on the nominees, and these nominees reflect a high standard of discipline and loyalty, "party discipline" is enhanced.

One further question has been raised by the July 23 statement. It is noted that "To give [Member/officials] time for their Executive Branch duties, they would be excused from congressional committee work (while retaining committee seniority)." Several comments appear to be in order. How is a Member to make intelligent voting decisions within the committee if he does not participate in the work of his committee? Or is the Member who is excused from committee work also not to vote within the committee? The job of the Congressman is built, to a great degree, on the relationship between a Member and his committees. In large part, the committees define the Member. Members of the House, especially, find that one way to succeed in Congress is to develop subject area expertise in their assigned committees. A Member who becomes a committee chairman is often more closely identified with his committee than with the Congress in general; one recalls Wilbur Mills, before his fall from power, as master of the intricacies of the tax code in his position as chairman of the House Ways and Means Committee, and one recalls F. Edward Hebert, not as a master of debate on the floor, but as chairman of the House Armed Services Committee. Additionally, the committee is where the substantive work of legislation goes on. To suggest that a Member will have to give up his committee work as a condition for becoming a Member/official might be seen as a disincentive, especially to committee chairmen (exactly the people who would be most likely to assume Member/official status) who have many years invested in building a committee, recruiting Members to serve on the committee, and establishing the committee's territoriality in the congressional framework. These and other similar issues deserve serious reflection.

4. PRESIDENTIAL SUCCESSION IN THE CASE OF AN OFFICER/MEMBER OF CONGRESS

(By Raymond J. Celada, Senior Specialist in American Public Law,
The Library of Congress, Congressional Research Service)

Reference is made to your inquiry requesting information on a variety of matters relating to your proposal to amend the Constitution to permit Members of Congress to serve in the Executive Branch. This analysis is addressed to the third question posed in your correspondence of July 30, 1979, specifically, "Would the Officer/Member of Congress be included, if a cabinet member, in the Presidential Succession?"

Your proposed constitutional amendment would override current restrictions in Article I, § 6, cl. 2, on service by a Member in the Executive Branch. It would empower Congress to designate as many as fifty Executive Offices to which Members could be appointed in the manner specified by your proposal. Assuming that in the exercise of this power Congress by law designates Cabinet level positions as offices to which Members may be appointed, Cabinet Officer/Members of Congress would be eligible to discharge the presidential powers should circumstances arise which necessitate recourse to the Presidential Succession Act, 3 U.S.C. § 19.

The Presidential Succession Act comes into play when, for any reason, there is neither a President nor a Vice President. In brief, that Act applies when there exist simultaneous vacancies in both constitutional offices. Given that circumstance—a circumstance rendered less likely to occur by adoption of the 25th Amendment with its provision for filling a vacancy in the Vice Presidency—the act provides that the Speaker of the House, upon resigning as Speaker and as a Representative in Congress, shall act as President. If there is no Speaker, or if he fails to qualify, the President pro tempore, upon resigning as President pro tempore and as a Senator, shall act as President. A Speaker or President pro tempore, as the case may be, who acts as President serves in that capacity for the remainder of the presidential term except (1) when he is acting as President because of the failure of a President-elect and the Vice President-elect to qualify, he serves only until one of them qualifies; and (2) when he is acting as President because of the inability of the President and Vice President, he serves only until the removal of the disability.

A President pro tempore who acts as President because there is no Speaker, or because the Speaker fails to qualify, is not displaced by the subsequent election of a new Speaker who is able to qualify. If there is no Speaker or President pro tempore, or if neither of them qualifies to act as President, the succession passes to the heads of departments or Cabinet in the order of their creation, beginning with the

Secretary of State down to the most recent addition to that level of government, the Secretary of Energy. The taking of the oath of office by a Cabinet officer who thus assumes the powers and duties of the President constitutes his resignation from Cabinet office. His right to act as President continues only until a Speaker or President pro tempore is available and qualifies to supersede him. In the case of the succession of a Cabinet officer, however, the removal of a disability of any Cabinet officer higher in the succession order will not terminate the presidential service of the Cabinet Officer who has succeeded to the powers and duties of the Oval Office. In all cases, the individual must possess the prescribed constitutional qualifications regarding age, residence, and citizenship. In the case of Cabinet officers, only those whose appointments have been duly confirmed, and who are not under impeachment at the time, are eligible to act as President. During the time that any person acts as President, he is paid at the rate provided for the President.

Nominally, at least, Cabinet Officer/Members of Congress as envisioned by your proposal would be eligible to act as President under the current succession law should the appropriate circumstances arise. Stated differently, neither your proposal nor the Succession Act of 1947 deny the possibility of such service by such persons.

It should be noted that the current law requires that legislative leaders who succeed to the powers and duties of presidential office must resign both their leadership roles and their status as legislators. Similarly, Cabinet officers who may act as President automatically resign the lower office upon taking the presidential oath. Such action is written into the law to obviate separation of powers problems, particularly in the case of the named legislative officers. The law presumably would be read to require Cabinet Officer/Members of Congress to resign both positions although the law's authors did not envision the dual status that would be allowed by your amendment. However, the latter, if adopted, literally permits simultaneous service by Members in Executive Offices, not the premier Executive Office. Accordingly, a Cabinet Officer/Member of Congress would to all appearances have to resign both those offices before his or her succession.

5. APPOINTMENT OF CABINET AND SUBCABINET OFFICIALS UNDER A PROPOSED CONSTITUTIONAL AMENDMENT: DELAYS AND THE APPOINTMENT PROCESS

(By Joseph B. Gorman, Analyst in American National Government, Government Division, The Library of Congress, Congressional Research Service)

This analysis responds to certain questions raised in your letter of July 30, 1979, to Director Gilbert Gude concerning your proposed constitutional amendment which would permit Members of Congress to serve as executive officials under specified conditions. More exactly, this memorandum addresses the fourth set of questions in your letter, those dealing with the experience of nations with parliamentary governments.

According to "Parliaments of the World: A Reference Compendium" (prepared for the Inter-Parliamentary Union by Valentine Herman, with the collaboration of Francoise Mendel, and published in 1976 by The Macmillan Press Ltd., London), there are forty nations of the world which require or allow executive offices in the national government to be held by members of their national legislatures. These nations fall into three categories: those that do not require ministers to be Members of Parliament, those that require the head of Government and ministers to be Members of Parliament, and those that permit Members of Parliament to serve as ministers.

(1) The following five nations have no constitutional requirement that ministers be Members of Parliament, but they usually are: Belgium, Canada, Japan (a majority of the cabinet must be Members of Parliament), Israel (the prime minister must be a Member of Parliament), and Czechoslovakia;

(2) The following 14 nations require the head of government and ministers to be Members of Parliament: Australia, Bangladesh, Fiji, India, Ireland, Malawi, Malaysia, Malta, New Zealand, Pakistan, South Africa, Sri Lanka, United Kingdom, and Zambia;

(3) The following 21 nations allow Members of Parliament to serve as government ministers: Argentina, Austria, Bulgaria, Denmark, Finland, Federal Republic of Germany (West Germany), German Democratic Republic (East Germany), Hungary, Jordan, Republic of Korea (South Korea), Kuwait, Poland, Romania, Senegal, Sierra Leone, Spain, Syrian Arab Republic, USSR, Vietnam, Zaire, and Zambia.

The responses below to the fourth set of questions raised in your letter of July 30, 1979, to Director Gilbert Gude are based on the national experiences of nine nations: Australia, Austria, Belgium, Canada, Finland, the Federal Republic of Germany (West Germany), India, Ireland, and the United Kingdom. These nine nations were

selected as representative of the range of nations which, like the United States, are democratic societies with a high degree of civil liberties.

The points raised in your fourth set of questions are infrequently addressed in secondary works on the political systems of the respective countries. Therefore, rather than rely exclusively on the available literature, I have drawn heavily from thirteen interviews conducted with embassy personnel and journalists from the nine countries.

Those interviewed were: Jenny Byrne of the Melbourne (Australia) Age; Mike Steketee of the Sydney (Australia) Morning Herald; Franz Cyrus, Press Counsellor of the Embassy of Austria; Marlene Manthey of the Die Presse (Vienna, Austria); Count Francis de la Barre d'Erquelinnes, Charge d'Affaires ad interim of the Embassy of Belgium; George Elliott, Minister Counsellor of the Embassy of Canada; Lawrence Martin of the Toronto (Canada) Globe and Mail; Pasi Patokallio, Political Attaché of the Embassy of Finland; Werner Pieck, Counsellor of the Embassy of the Federal Republic of Germany; G. Parthasarathy, Counsellor for Press and Information of the Embassy of India; John Burke, Counsellor, Embassy of Ireland; John Weston, Counsellor, Embassy of the United Kingdom; and Harry Jackson of the Manchester (England) Guardian.

In the discussions which follow, you may assume general common national experiences among the nine nations, unless otherwise noted. The responses from those with whom I discussed these questions, as well as relevant references in the literature, were remarkably similar within the group of nine nations.

I. What has the experience of nations with parliamentary government shown with regard to cooperation and communication between the government (which consists, of course, of Members of Parliament) and the Parliament itself? Is there less stalemate and more accomplishment in parliamentary systems than in the United States' system? How are the potential conflicts raised in question 1, and the potential impediments to the conduct of legislative business raised in question 2, dealt with in parliamentary systems?

Under a parliamentary system there is a much greater degree of cooperation and communication between legislature and executive than under the American system. This is due not only to the relative absence of any separation of powers between the branches of government but also, coincidentally, to the high degree of party discipline within the political parties in the respective nations. Most votes in foreign parliaments are strictly along party lines, with all party members accepting the party consensus regardless of the effect on local constituencies.

Whether this leads to more accomplishment is, of course, in the mind of the beholder, if one grants that inaction on complex and controversial issues may be considered a greater accomplishment than premature, ill-considered or mistaken action. It is relatively simple for a majority government to pass its legislative program under a parliamentary system. Those nations which regularly have minority or coalition governments (Belgium and Finland, of the nine examined for this analysis) experience a greater degree of tension between the executive and the legislature, but then only because both executive and

legislature are internally divided rather than because the powers of legislature and executive are pitted monolithically against one another.

The fact that the executive draws its ultimate power from the legislature insures limits to any lack of cooperation or communication, although it is true that the executive can and often does take on a life of its own and can become remote from the general membership of Parliament. Dissatisfaction over the state of executive-legislative relations, if present, would first make itself felt through party channels; rarely, if ever, would the majority of Parliament act, outside party channels, against the executive which it had itself created. Again, the key to understanding the relationship between the legislature and the executive in foreign parliamentary systems is the high degree of party loyalty. In the United States, the debate over the role of an officeholder is generally over whether an elected official is an agent of or trustee for the people; in foreign parliamentary systems, it is assumed that elected officials are to a great extent agents of political parties, which, in turn, may act as either agents of or trustees for the people.

It is inconceivable in foreign parliamentary systems that the general membership of Parliament would be organized or operated in a way inconsistent with the effective governing of the nation through the executive. Officers of the Parliament itself, including committee chairpersons, are selected by the same coalition of forces (usually within one party) which select the head of government (usually termed the prime minister) and his cabinet. Where this is not the case (where, for example, it is tradition that opposition members chair certain committees), those positions are without real power. In any event, whatever tensions may exist in a parliamentary government between the legislature generally and the executive are not due to institutional structure; indeed, they are minimized by that structure.

II. Do parliamentary governments experience more frequent changes at the heads of ministries than does the United States at the head of cabinet departments? If so, does the greater turnover have a negative effect on those ministries' effectiveness?

This question is best addressed by noting that among the nine nations examined, the point was repeatedly made that among the party leadership (which, when a party has a majority in Parliament, is reflected in government leadership) there is much less sudden and dramatic turnover than in the American system.

In foreign parliamentary systems, the cabinet reflects the compromises worked out within the majority of Parliament rather than reflecting the head of government's arbitrary choice of subordinates. Thus, any specific cabinet minister is likely to speak for an important constituency within the majority in Parliament, whether that majority is contained within one party or has been created by a coalition of parties.

For that reason, it might seem that foreign parliamentary cabinets would be more unstable than American cabinets, where the source of appointment, the President, serves a fixed 4-year term. In fact, I was repeatedly told that there is much greater stability in the executive positions of foreign parliamentary systems (both the political parties and the governments) than in the American system (although Finland has had 61 governments in 62 years of independence; I was told,

however, that this is a misleading statistic—that most of the ministers from one government reappear in the next in the same or another position). I have not done a quantitative analysis to determine the extent to which this is true; however, assuming it is, it may derive to some extent from the existence in foreign parliamentary systems of a permanent civil service whose responsibility it is to implement policy, while cabinet ministers play more of a liaison role with Parliament and party, and, representing forces within the ruling party or parties, cannot be dismissed as lightly as American cabinet members who owe their appointments solely to the President.

In both the American system and foreign parliamentary systems, there is opportunity for cabinet personnel to be both administrator and policy planner; but there is more emphasis in the foreign cabinets on cabinet member as policy planner, acting in that capacity as the agent of the government—and ruling parliamentary majority—collectively. Thus, since party policy would not, presumably, change radically in regard to a specific policy area during the tenure of a government, and since, in addition, the implementation of the policy would be principally the responsibility of the permanent civil service, turnover at the cabinet level in a foreign parliamentary system would have less impact on the effectiveness of a ministry than in the American system.

In spite of the lesser impact on government of turnovers in cabinet positions in foreign parliamentary governments, it seems that there is, in fact, less turnover; and, such turnover as there may be is often the reshuffling of ministries rather than the dismissal from the cabinet altogether of a minister.

The trend in the American system toward politicization of top-level sub-cabinet positions, removing them from the permanent civil service, is in contrast to the practice in foreign parliamentary systems of maintaining a permanent civil service in executive departments for all but the very highest levels of executive administration.

III. How do members of Parliament who serve in the government divide their time between executive and legislative duties?

In foreign parliamentary systems, the executive so thoroughly dominates the legislative process that membership in the executive is by definition the ultimate fulfillment of legislative duties and responsibilities. Government ministers participate in all legislative functions in which the exercise of real power is involved. If they are not present for all perfunctory legislative activities, such absence is accepted as an inevitable result of cabinet responsibility.

Cabinet ministers are, after all, responsible to the majority in Parliament, and it is not in the interest of a majority seeking to govern competently and effectively to hobble cabinet ministers seeking to provide that government. As noted above, it is one of the responsibilities of a cabinet minister to serve as a liaison between the Parliament generally and executive departments; thus, a cabinet member devotes a great deal of time to explaining and defending government policies to Parliament and to reflecting party—and leadership—positions in the area of his cabinet responsibilities.

Under a parliamentary system, it is not as important for a cabinet member to form an independent judgment on all the issues coming be-

fore the Parliament on which he might vote because of the great importance of and respect for party loyalty and discipline. As for how a cabinet member handles the aspect of his legislative duties relating to constituent relations, see Part IV below.

IV. Does alleged inattention to the specific interests of a Member of Parliament's constituency become a political issue for Members who serve in the government? If so, would the differences between the roles of Parliament Members and Members of Congress tend to mitigate or exacerbate Executive Branch service by a legislator as a political issue?

In foreign parliamentary systems, the political party is much more important than in the American system, where election success is based much more on personal popularity. Because of the overriding importance of political parties in foreign parliamentary systems, voters are much more swayed by general party appeals than by the attention given by individual Members of Parliament to local constituent interests. This is not to say, however, that keeping fences mended back home is not an important responsibility of a Member of Parliament; but since one of the most obvious measures of success of a Member of Parliament would be his inclusion in the national government as a cabinet minister, whatever lack of personal attention to constituent matters which might result is more than offset by the pride of the constituency, as well as the presumed (and, no doubt, real) enhanced influence the Member would have in protecting local interests within the party and in the government.

Most foreign parliamentary systems provide—either through the party or through the government—for assistance in handling constituent matters for those Members serving in the government. It would appear that, in spite of presumably less direct personal contact, a Member serving in the government may be in a better position to protect constituent interests than a Member not serving in the government—and that this may be recognized and rewarded by constituents. In addition, in Finland, West Germany, and Austria, elements of proportional representation give parties an opportunity to protect party leaders even in the face of constituent disapproval of national policies supported by the Member. In Great Britain and Canada, furthermore, some shopping around for safe districts for loyal party members is possible. In Ireland, the use of the single transferable vote practically insures that a party can elect at least one Member per district, thus maximizing the opportunity to protect party loyalists running in competitive or opposition-controlled districts.

All those with whom I discussed this topic termed it rare to the point of being unheard of that a local constituency would react negatively to executive service by a Member on the grounds that time was taken from constituent responsibilities.

This might very well not be the case with Members of Congress serving in the cabinet under the proposed amendment, partially because American voters are much less committed to the concept of a national party policy which would be honored even at the expense of local interests; American voters have in the past proved to be relatively intolerant of a Member's support for administration policies which were not perceived as beneficial to the State or district, even when a strong case was made that such policies were in the national interest. Further,

cabinet service in foreign parliamentary systems is seen in those nations, correctly, as the ultimate public service, a goal to which almost all Members of Parliament aspire; in the American system, under the proposed amendment, even if cabinet service of lengthy tenure resulted, such service would always be seen as transitory, and constituents might not be as likely to perceive cabinet service as a reflection of greater influence by a Member within a party generally; indeed, if a Member's selection were seen as a personal choice by the President, the Member could even be politically damaged by the perception back home that he was simply one of the President's cronies.

I trust this analysis is responsive to the fourth set of questions raised in your letter of July 30, 1979.

6. THE QUESTION OF TIME DEMANDS IN THE CONSIDERATION OF A PROPOSAL TO AMEND THE CONSTITUTION TO ALLOW MEMBERS OF CONGRESS TO HOLD CONCURRENT POSITIONS IN THE EXECUTIVE BRANCH

(By Daniel Mulhollan, Analyst in American National Government, Walter Oleszek, Specialist in American National Government, and Susan Sadtler, Analyst in American National Government, Government Division, The Library of Congress, Congressional Research Service)

A proposal to amend the Constitution to permit Members of Congress to serve in the executive branch has been submitted to the national legislature and the academic community. An important consideration is the following: "Would the press of executive duties permit the Officer/Member of Congress sufficient time to attend to constituent service and legislative responsibilities?"

To address this question it is important to determine how much time Members spend on their legislative and constituents duties. This report relies on the most current available data concerning the activities of Senators and Representatives. They include the study undertaken by the 1976-77 House Commission on Administrative Review, the 1975-76 Senate Commission on the Operation of the Senate, and the 1976-77 Senate Temporary Select Committee To Study the Senate Committee System. The report concludes with a brief overview of how federal executive officials allocate their time.

The analysis which follows describes House and Senate scheduling practices and the allocation of time by Members among many legislative duties. The material highlights the demanding and wide-ranging responsibilities of Representatives and Senators. However, it should be noted that proponents of the proposed constitutional amendment suggest that legislators would be excused from congressional committee work (while retaining committee seniority) during their period of joint legislative-executive service. The clustering of floor votes would also save the time of Members who serve in the executive branch.

HOUSE OF REPRESENTATIVES

Scheduling of House activity is affected by both fixed elements and numerous discretionary factors. The manner in which they combine determines the actual schedule in a given session.

FIXED ELEMENTS GOVERNING HOUSE CALENDAR

Constitutional Requirements

The Constitution prohibits the House from adjourning for more than three days during a session without the consent of the Senate.

The House is also required to meet once a year, convening on January 3rd unless otherwise prescribed by law.

Budget Deadlines

The Budget Act of 1974 has had a major impact upon the scheduling of legislative business. Each stage of the budgetary process is set forth in the Act with deadlines for completing each activity:

November 10—Current Services Budget received.

Fifteenth day after Congress convenes—President's budget received.

March 15—Advice and data from all congressional committees to the Budget committee.

April 1—Congressional Budget Office reports to the Budget Committee.

April 15—Budget Committee reports out first budget resolution.

May 15—Congressional committees report new authorizing legislation.

May 15—Congress completes action on First Concurrent Budget Resolution.

Seventh day after Labor Day—Congress completes action on all spending bills.

September 15—Congress completes action on Second Budget Resolution setting spending ceiling and revenue floor for new fiscal year.

September 25—Congress completes action on any reconciliation measures.

October 1—Fiscal year begins.

Recesses and Holidays

One major recess and a number of holidays are dictated by statute. The Legislative Reorganization Act of 1970 provided for the adjournment of Congress from the 30th day before to the 2d day following Labor Day (in effect the month of August) during the first session of each Congress. The House also observes the following official public holidays.

New Year's Day, January 1.

Washington's Birthday, the third Monday in February.

Memorial Day, the last Monday in May.

Independence Day, July 4.

Columbus Day, the second Monday in October.

Veterans Day, the fourth Monday in October.

Thanksgiving Day, the fourth Thursday in November.

Christmas Day, December 25.

In addition the House traditionally observes a number of holidays that are not prescribed by statute: Inauguration Day, Lincoln's Birthday, Good Friday, Yom Kippur, and Rosh Hashonah. It also recesses for the national party conventions every four years and adjourns or recesses for congressional elections in the 2d session of each Congress.

The House Rules also provide for given times at which certain business shall be transacted.

Special Calendars

Floor activity is structured partially by special calendars and procedures. On specified days of the month certain procedures are in order.

The most important of these is Suspension of the Rules which is in order every Monday and Tuesday of the month. Suspensions provide an alternative to the regular legislative process, and serve to expedite the passage of legislation. Under Suspension of the Rules, cluster voting is permitted. The motion to suspend the rules and pass a bill, when recognized, requires a two-thirds vote.

The Consent Calendar is in order on the first and third Mondays of each month; the Private Calendar is dealt with on the first and third Tuesdays of each month; and the District of Columbia Calendar is considered on the second and fourth Mondays of each month. These procedures are designed to segregate noncontroversial and private business from the consideration of major and generally controversial legislation. Calendar Wednesday permits committees to call up bills every Wednesday. However, this procedure is usually dispensed with by unanimous consent.

Within the broad limits of law and the House Rules, the discretionary aspects of scheduling are controlling. Thus, the Majority Leadership possesses considerable leeway in determining the legislative priorities for a session, outlining a schedule for taking up legislative measures, and allocating time for their consideration. But, leadership decisions are affected and often controlled by committee and subcommittee chairmen and the Rules Committee. Discretion is also limited by the Minority Leadership, and, at times, by the wishes of individual members.

Planning is undertaken for the entire session, for the month, and for the week. Plans are influenced by the fixed course of the schedule. However, within these limits the leadership determines when the House will not be in session and thus controls the amount of time Members can plan in advance for district work or travel. The Leadership also decides the length of recesses around national party conventions, and, with Senate leaders, whether to adjourn or recess for Congressional elections. Monthly and weekly planning deal with more immediate scheduling. Planning occurs on a daily basis also, as bills are removed and added to the calendars. Although these changes preserve flexibility, they often disrupt the weekly agenda and frustrate monthly planning.

PROBLEMS IN THE PRESENT SCHEDULE

The House Commission on Administrative Review collected data on the 94th Congress that reveal consistent and pronounced fluctuations in legislative activity both on the floor and in committee. The information showed a significant lag at the beginning of both sessions, a concentration of work during mid-week, and obvious peaks in the workload prior to budget deadlines and recesses. The concentration of meetings and legislative activity within limited time periods resulted in intensified pressures on the individual Member's schedules.

Early Session Lag

During the 94th Congress, the House was slow in getting started in both sessions. January was spent on organizational matters. Figures for 1975 show only eleven hours of floor sessions in January as op-

posed to 110 hours in December.¹ In the following session there were 34 hours of floor activity in January and 154 hours in September (the House adjourned October 1).²

Committees too experienced an early session lag. In the first session 23 full committee meetings were held in January; this figure jumped to more than 80 in February.³ The lag occurred in the second session also, though it was less pronounced than in the first. On the subcommittee level, this was also found to be the case. There were 131 subcommittee meetings in January, 1976 and 413 in February of that same year.⁴

Concentration of Work in Mid-Week

The Commission's figures show that legislative business consistently increased during mid-week. The total number of floor sessions conducted on each day of the week, Monday through Thursday, averaged 68 for the 94th Congress. Friday meetings for both sessions, however, only totaled 37.⁵ Information on the number of committee and subcommittee meetings revealed a similar pattern.⁶

Peaks Related to Deadlines and Recesses

Legislative activity both in committee and on the floor traditionally peaks significantly before a recess. In the second session of the 94th Congress, Budget Act deadlines served to heighten these peaks in legislative work.

In addition, traditional sources of deadline pressure continued to have an important impact. Extended floor sessions were recorded before each major recess in 1976. Nearly a 10-hour session took place before Easter; two nine-hour sessions were held prior to the Republican convention; and marathons averaging thirteen hours a day took place in the 5 days preceding adjournment.

Pressures on Individual Members

The uneven flow of legislation and constant changes in the weekly agenda presents formidable obstacles to Members trying to plan their schedules. During the 94th Congress business was slow during January of both sessions, but daily floor sessions and committee organization required the attention of Members. Later on, their schedules were jammed with committee meetings and floor sessions, often occurring at the same time. This problem was compounded by the concentration of legislative activity during the middle of the week.

Overall, the increase in Congressional business has restricted the ability of the Members to work in their districts. For example, Monday floor sessions and committee meetings are more common now than they were a decade ago. The following chart ⁷ reveals the increase of time that the House spends in session.

¹ Scheduling the Work of the House, Report of the Commission on Administrative Review, U.S. House of Representatives, 1976, p. 5.

² *Ibid.*, p. 5.

³ *Ibid.*, p. 6.

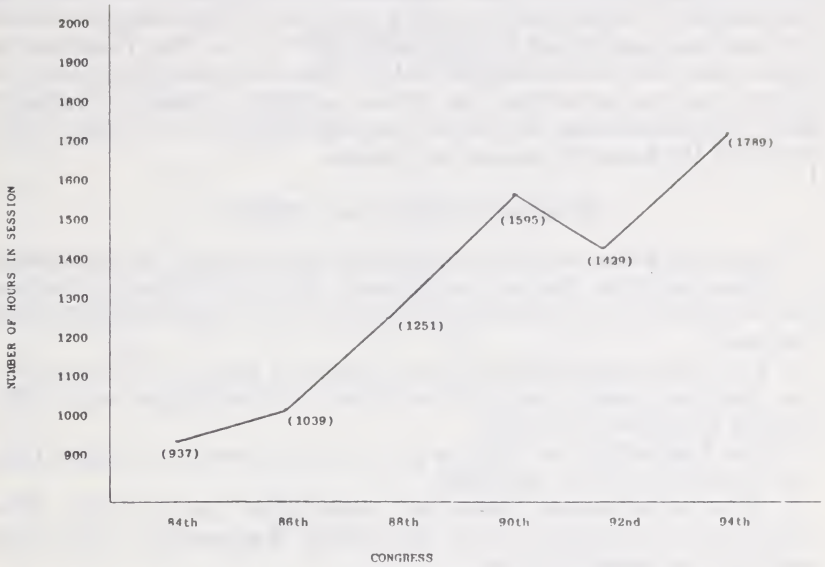
⁴ *Ibid.*, p. 6.

⁵ *Ibid.*, p. 7.

⁶ *Ibid.*, p. 7.

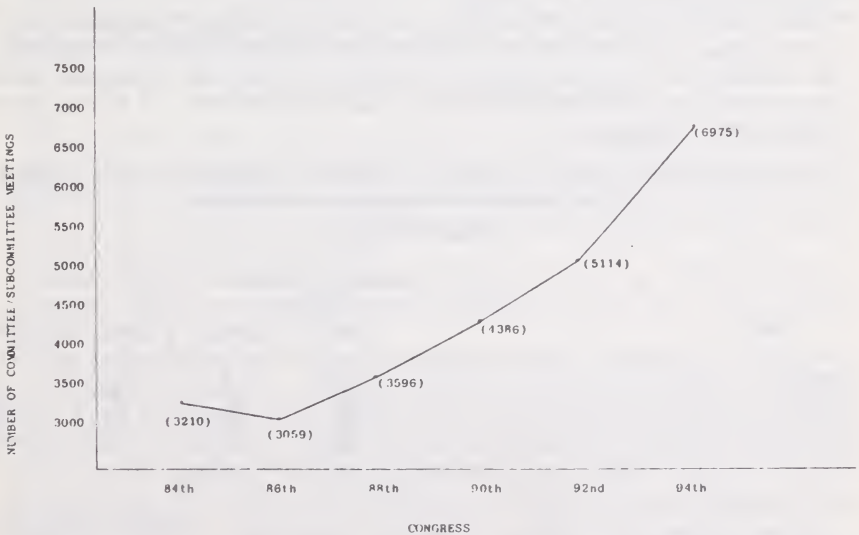
⁷ U.S. Congress, House of Representatives, Commission on Administrative Review, Task Force on Work Management, Draft Report on Time Use and Scheduling, September 2, 1977.

NUMBER OF HOURS IN SESSION
84th - 94th CONGRESS



Correspondingly, the number of committee and subcommittee meetings has risen also, more than doubling in the decade between the 84th and 94th Congresses. The following chart⁸ reflects this rise in the number of committee meetings.

NUMBER OF COMMITTEE AND SUBCOMMITTEE MEETINGS
84th - 94th CONGRESSES



⁸ Ibid.

Finally, the number of votes and quorum calls has increased significantly since 1970. This also has added to the pressure on a Member. The number of rollcall and recorded votes in the 94th Congress totaled 1273 and the number of quorum calls 419.⁹ In the 91st Congress the figures were 443 and 369 respectively.¹⁰ Even assuming that these procedures took no more than the fifteen minutes formally allotted to them, this means that the House devoted 308 hours to voting procedures and 105 hours to quorum calls alone.

RECOMMENDATIONS AND RESULTS

To provide for more efficient legislative scheduling, the Commission on Administrative Review established some scheduling guidelines, most of which were adopted by the House at the beginning of the 95th Congress:

1. The House established a firm schedule of annual work periods so that Members could plan their activities in Washington and in their districts with more certainty.

2. The Leadership set forth a floor schedule based on budget deadlines to smooth out the workload.

3. Firm adjournment times were established for each day. Floor sessions end by 5:30 p.m. every day except Wednesdays, with Friday meetings to adjourn at 3 p.m.

4. Based on the belief that one individual should not be able to prevent committees from meeting during the periods of heavy legislation, committees and subcommittees were permitted to meet unless ten Members objected when the House was considering amendments in Committee of the Whole.

5. The House clusters votes on noncontroversial rules and holds general debate on a series of bills before considering them for amendment in Committee of the Whole.

The positive impacts of the time use and scheduling changes adopted by the House are reflected in the table below. There were more committee meetings during the first few months of the 95th Congress with more time for floor debate in May; this is the reverse of the pattern for the 94th Congress.

COMPARING THE NUMBER OF COMMITTEE SUBCOMMITTEE MEETINGS AND THE NUMBER OF HOURS IN SESSION, THE 1ST SESSION OF THE 94TH AND 95TH CONGRESSES

(January through May)

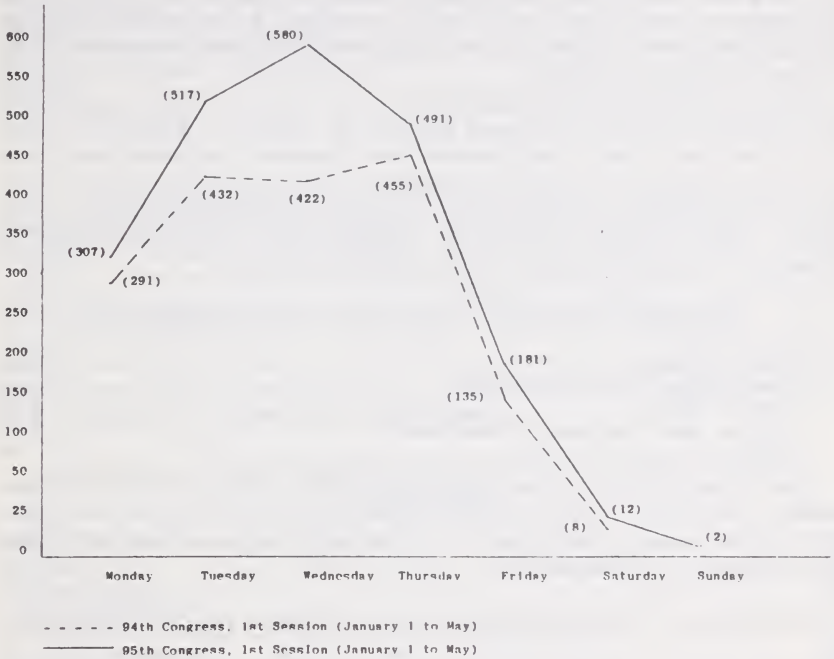
Month	Committee subcommittee meetings		Hours in session	
	94th	95th	94th	95th
January	35	45	12	19
February	229	403	38	83
March	494	730	74	98
April	525	472	68	71
May	460	440	79	101

⁹ Studies Dealing with Budgetary Staffing and Administrative Activities of the U.S. House of Representatives, Committee on House Administration, U.S. House of Representatives, 1978, p. 73.

¹⁰ Ibid., p. 73.

However, attempts to mitigate against the mid-week committee meeting overload were not successful as indicated by the table below.¹¹

NUMBER OF COMMITTEE MEETINGS ON EACH DAY
OF THE WEEK, 1975-1977, JANUARY
THROUGH MAY



The importance of committee meetings in a Member's workload underscores the potential impact on a Member's time should he or she be freed of committee duties to assume executive office.

ALLOCATION OF A MEMBER'S TIME

The growth of the Federal government, the complex and technical nature of contemporary problems, the nation's extensive international commitments, and the increasing awareness and activity of constituents and interest groups have combined to inundate Congress with requests for service and new legislation.

These developments have fostered serious time use and scheduling problems. More specifically these problems include the severe fragmentation of a Member's time.

The Commission on Administrative Review undertook a study of how legislators' time is allocated among various activities. Pertinent data were obtained from scheduling logs kept by the Members' appointment secretaries during the period from May to July 1977. As priorities of legislators differ, the data do not indicate how each Member spent his or her day; the figures are simply averages derived from aggregate data.

¹¹ Ibid.

Despite individual discrepancies the data reveal that Members are very busy people. An average day for a legislator is so filled with diverse activities that little time is available for concentrated attention on any single issue. Members have exhaustive schedules that keep them running back and forth from their offices to floor sessions, committee meetings, or receptions and events in various parts of Washington. Legislators also are regularly traveling back and forth between Washington and their districts.

On the average, Representatives were found to work an 11-hour day, starting at 8:30 a.m. and ending at 7:30 p.m. There are many variations, but there is no question that Members do put in long days. The Commission divided time spent into four general categories: time on the floor and in committee and subcommittee meetings; time in the office; time in other locations in Washington; and time outside of Washington. These findings are summarized below.

Allocation of Members' time among general categories

Location of activity:	Hours
Time on floor and in committee.....	4 : 25
Time in office.....	3 : 19
Time in other locations in Washington.....	2 : 02
Other	1 : 40

The Commission further found that of the 4 hours and 25 minutes spent on the floor and in committee, more than half the time was spent on the floor alone. Following is a breakdown of time Members spend on the floor and in committee.

Allocation of Representatives' time on the floor and in committee

Activity:	Time (hours and minutes)
In the House Chamber.....	2 : 53
In committee meetings.....	: 43
Hearings	: 09
Business	: 04
Markup	: 27
Other	: 03
In subcommittee meetings.....	: 39
Hearings	: 17
Business	: 05
Markup	: 15
Other	: 10
In conference meetings.....	: 10
Total hours	4 : 25

A Member spends almost three and a half hours in the Office on an average day. He or she spends roughly three quarters of an hour meeting with constituents, organized groups, the press, government officials, as well as dealing with office management. Almost one hour is used in consultation with personal and committee staff, while five minutes is consumed by sessions with other Representatives. The Member devotes approximately one and a half hours to the preparation of legislation and speeches, answering mail, reading, and telephone calls. The following table shows the division of time among these activities.

Allocation of Representatives' time in the office

	<i>Minutes</i>
With constituents.....	: 17
With organized groups.....	: 09
With others.....	: 20
With personal and committee staff.....	: 53
With other Members.....	: 05
Answering mail and signing letters.....	: 46
Preparing legislation and speeches.....	: 12
Reading.....	: 11
On telephone.....	: 26
Total hours.....	3 : 19

In addition to legislative and office duties, Members spend two hours a day in other locations on Capitol Hill and in Washington. On the average, 40 minutes are consumed meeting with constituents in the Capitol and attending receptions on the Hill and in other parts of Washington. Members devote about a half hour to meeting with other Members, informal groups, and party leaders. Personal business, which include working at home, requires 28 minutes a day. Another half hour is spent traveling to appointments in Washington and consulting with staff. A summary of these activities follows.

Allocation of Representatives' time in other locations including Capitol Hill

	<i>Minutes</i>
With constituents in Capitol.....	: 09
At events.....	: 33
With leadership.....	: 03
With other Members.....	: 11
With informal groups.....	: 08
In party meetings.....	: 05
Personal time.....	: 28
Other.....	: 25
Total hours.....	2 : 02

The four tables clearly indicate that the demands on a Member's time are heavy; their days are long and fragmented. Rarely do Members have sufficient blocks of time to think about the implications and ramifications of various public policies. As a result, legislators are often compelled to rely on the judgment of others—agency officials, staff, colleagues, or lobbyists for evaluation on legislation.

No matter how conscientious or capable a Member might be, the fragmentation of his or her time hinders the effective conduct of legislative, oversight, and representative functions.

Adding to the difficulties caused by the fragmentation of the Members' time are unpredictable or untimely developments in scheduling. These occur when the Member is given short notice that he or she should be somewhere other than where he or she planned to be. The most meticulously planned schedule can be disrupted by changes in committee meetings, unanticipated meetings with colleagues and staff, or a surprise visit from an important constituent.

The Commission found that Members are frequently confronted with unpredictable changes in their schedules. Some legislators have at least four or five short notice schedule changes per day. Twenty-

four percent of all short notices involved unexpected meetings with constituents. Another twenty-two percent of short notices involved meetings with other Representatives and staff aides. The date further revealed that 62 percent of these short notices occurred in the afternoon, the time when most floor sessions are held.

The data on the use of a Member's time clearly indicate that committee related work constitutes a significant portion of his time. It appears that relieving a Member from his committee duties would be of significant assistance in providing a Member sufficient time to assume the duties of an Executive official.

SENATE

There is no doubt that the Senate is faced with the same time and scheduling problems previously enumerated in the discussion on the House. Senators, too, work long hours and their time is severely fragmented. They also must cope with lengthier hours on the floor and in committee and the demands of a more politically aware and government-affected constituency.

The following chart indicates the growth of legislative activity from the 80th to the 94th Congresses.¹²

U.S. CONGRESS, LEGISLATIVE ACTIVITY: 80th THROUGH 94th CONGRESSES

Congress	Public bills enacted ¹	Pages of public bills enacted ²	Number of private bills enacted ¹	Pages of private bills enacted ²	Vetoes ³		Vetoes overridden ³
					Regular	Pocket	
80th.....	906	2, 236	458	182	42	33	1
81st.....	921	2, 314	1, 103	417	70	9	3
82d.....	594	1, 585	1, 023	360	14	8	3
83d.....	781	1, 899	1, 002	365	21	31	0
84th.....	1, 028	1, 848	893	364	12	22	0
85th.....	936	2, 435	784	349	18	33	0
86th.....	800	1, 774	492	201	22	22	2
87th.....	885	2, 078	684	255	11	9	0
88th.....	666	1, 975	360	144	5	4	0
89th.....	810	2, 912	473	188	10	4	0
90th.....	640	2, 304	362	128	2	6	0
91st.....	695	2, 927	246	104	7	4	2
92d.....	607	2, 330	161	67	6	14	2
93d.....	649	2, 361	123	48	27	12	5
94th.....	588	2, 963	141	(4)	32	5	8

¹ Source: Congressional Record, Daily Digest.

² Sources: U.S. Statutes at Large; American Law Library, Library of Congress.

³ Sources: U.S. Congress. Senate. Secretary of the Senate. Presidential vetoes. Washington, U.S. Government Printing Office, 1969; also selected Congressional Research Service compilations by Ronald C. Moe, senior analyst.

⁴ This information is not readily available.

NOMINATIONS

Consideration of nominations is a major responsibility of Senate committees and the quantity of nominations is substantial and growing.

In evaluating nominations the committees spend weeks on investigation and several days in hearings before extensive floor debate and eventual approval of the nomination. This is especially true when

¹² U.S. Congress. House. Committee on House Administration. Studies Dealing with Budgetary Staffing and Administration Activities of the U.S. House of Representatives. Committee on House Administration. U.S. House of Representatives, 1978. p. 73.

nominees are slated for positions in the Cabinet or on the Supreme Court. For other offices the scrutiny has been less systematic. The tendency has been to go along with the President's choice unless there has been good reason to do otherwise. As a result, nominees have usually obtained routine approval.

However, as a part of recent congressional reassertion there has been a revival of interest in nominations within the Senate. During the last several years the number of controversial nominations sharply increased.

The following table indicates the increase in the number of nominations the Senate considered between the 80th and 94th Congresses.

<i>Number of nominations, 80th through 94th Congresses</i>	
Congress:	Nominations
80th -----	66, 641
81st -----	87, 266
82d -----	46, 920
83d -----	69, 458
84th -----	84, 173
85th -----	104, 193
86th -----	91, 476
87th -----	102, 849
88th -----	122, 190
89th -----	123, 019
90th -----	120, 231
91st -----	134, 464
92d -----	117, 053
93d -----	134, 384
94th -----	133, 302
Total -----	1, 539, 619

CONSTITUENT SERVICES

In addition to performing a variety of legislative and advisory tasks, the Senate also functions as a major service organization. And Senators take these services seriously. Little research has been done in this area, but the Commission on the Operation of the Senate was able to develop a general profile of Senate constituent service activities. Basing the study on casework, the largest single service area, the Commission determined that because volume is related to state size, the most populous states received a disproportionate share of the mail. The following table shows the average yearly distribution of cases.

<i>Average yearly distribution of cases</i>	
Small States-----	1,000-2,000
Medium-sized States-----	2,000-3,000
Large States-----	8,000-70,000+

Project work also varies by state size, but other factors can influence the number of projects handled by a Senator's office; specific state problems and numerous government installations contribute to state project work.

The Commission found that direct constituent requests for publications and general information seem to be slightly more proportional in volume among states. Smaller states in the study averaged about 100 requests a month and larger states about 300 per month.

ALLOCATION OF A SENATOR'S TIME

Effective and efficient use of time is a prominent concern of Senators. In efforts to find ways to alleviate the problem of scheduling a Senator's day, the Commission on the Operation of the Senate undertook a series of studies to determine how a Senator spent his time. The resulting data were compiled from time logs kept by Senators' appointment secretaries from February to May, 1976.

The studies highlighted the nature of Senators' days: long, fragmented, and unpredictable. On the average, Senators put in an 11-hour day. On over half the days the Senate was in session it did not adjourn until 6 p.m. or later. Despite their length, each senatorial day was a scheduler's nightmare. There were constant interruptions, specific activities took an unanticipated amount of time, and seldom were there blocks of time of sufficient duration to permit Senators to follow through to their satisfaction, the matter at hand.

The study revealed that on the average, only one-third of Senators' time was spent either on the floor or in committee. Roughly two hours were consumed at functions outside the office, with another two hours being taken up with mail, press relations, and related matters. The two and a half hours with staff overlapped in part with time spent in other categories.

Allocation of time (hours and minutes) among major activities¹

In Senate Chamber-----	1 :35
In committee/subcommittee-----	2 :25
Subtotal -----	4 :00
Talking with constituents and interest groups in Senate office-----	1 :40
Events outside of office (meetings, speeches, etc.)-----	2 :10
Mail and public information-----	2 :10
Working with staff and reading staff papers-----	2 :35

¹ Due to overlap among these activities the total time exceeds the 11-hour average day of Senators. These time figures are based upon accountings for entire days in Washington.

CONFLICT BETWEEN COMMITTEE AND FLOOR ACTIVITY

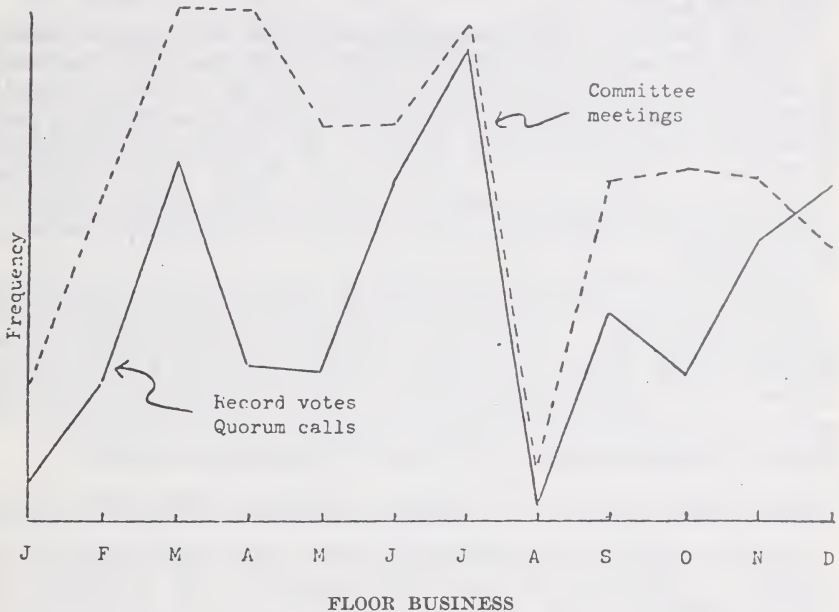
Senators frequently complain that they have too many committee and subcommittee meetings scheduled at the same time. The Commission's analysis showed that while there is frequently an overlap in meeting times, the more serious problems appear to be conflicts between committee and floor activities, and between those legislative responsibilities and other commitments.

One of the most bothersome conflicts for Senators is that between committee meetings and the demands of the floor. Recorded votes and quorum calls in particular are demands on a Senator's time over which he or she seldom has much control. Most of this conflict occurs in the afternoon because most of the recorded votes and quorum calls come later in the day, and the morning hours are seldom taken up with consideration of specific bills and resolutions.

The chart below summarizes the monthly trend for 1975 in the number of committee and subcommittee meetings and the number of record votes and quorum calls. The curves follow a more or less similar

pattern through August, but then diverge as the number of committee meetings holds to a higher relative frequency through November.¹³

Pattern of Committee Meetings and
Record Votes and Quorum Calls for 1975



The problems caused by the increase in legislative activity are exacerbated by scheduling procedures in the Senate. Unlike the House, practices and procedures of calling up business in the Senate are highly informal and flexible, since any Senator is as free, under the Rules, as the leadership to move to call up a measure. By the same token, any Senator is free to object to a motion to consider a measure. Coupled with the protection of extended debate (Rule XXII), the question of whether consent will be obtained to call up a measure for consideration in the Senate is sometimes a very delicate one. In addition, the Senate does not have a counterpart to the House Rules Committee, which proposes the terms and conditions for consideration of legislation.

This problem has been alleviated somewhat by adherence to the deadlines in the Budget Act and by the use of unanimous consent agreements. Yet some Senators believe that the use of unanimous consent agreements has denied them the opportunity to participate in determining the conditions concerning the calling up and disposition of measures.

Additional criticism has been caused by the waiving of the one-day "layover" requirement in the Senate Rules and the three-day "layover" requirement in the 1970 Legislative Reorganization Act. Layovers can

¹³ U.S. Congress. Senate. Commission on the Operation of the Senate. *Toward a Modern State. Final Report of the Commission of the Senate.* December 1976. p. 43.

be waived by unanimous consent or at the discretion of the Majority and Minority Leaders, often with short notice.

Another concern is that in the interest of keeping Senate business flowing rapidly, measures are often called up with little or no warning. Closely associated with this issue is the inability to know when a session will end.

Finally, the Senate itself does not always have the ability to schedule the pace of action on major and controversial measures. That body is essentially at the mercy of the committees of jurisdiction which apply their own values and judgments to crucial issues of timing, both in relation to executive branch initiatives and to action by the House. Analogous to this concern is the fact that closely related measures emerging from different committees may arrive at the Senate floor and be proposed for consideration without any coordination between or among them.

Again, the data reveal that committee related work constitutes an important portion of a Senator's day. Relief from committee duties certainly would aid a Senator in assuming the responsibilities of an executive office. However, the loss of committee work has to be considered as having an impact upon the role of a Member of the House or the Senate, particularly when one takes into account the crucial part played by congressional committees in the legislative process.

POSSIBLE TIME DEMANDS ON A MEMBER ASSUMING AN EXECUTIVE OFFICE

Another question to be addressed is how much time would be demanded of a Member by the duties imposed by the assumption of executive office?

Although no quantitative data regarding the allocation of a cabinet member's time could be obtained, empirical evidence indicates that his or her day is also long and demanding. There are approximately 700 top executives—deputy secretaries, undersecretaries, assistant secretaries, administrators, deputy administrators, commissioners, and so on—who are appointed to office in the agencies and departments under the Executive schedule.¹⁴ As the duties of these officials are varied and wide-ranging, this paper is limited primarily to the cabinet member and the key executive official.

One variable to consider in regards to the demands on a cabinet appointee's time is the way in which each individual President uses his cabinet, for essentially cabinet members are extensions of the President. Since its existence is based on custom and tradition rather than on any statutory requirement, the President may use the Cabinet as he wishes: he may seek its counsel as a whole or individually; he may call on it simply to signify unity within his administration or show that he is taking action; or he may ignore it altogether.

Another variable is the appointee himself or herself. The demands on the time of each official frequently depend on his or her own personality and political talent or merely on the accident of circumstances—whether he or she happens to head or hold a crucial position in a department or agency dealing with a currently critical issue.

¹⁴ Heelo, Hugh. *A Government of Strangers*. Washington, D.C., Brookings Institution, 1977. p. 30

Even if their counsel is not sought by the President, Cabinet members have the major responsibility for running their departments and proposing legislation. Executive officials hold their positions for relatively brief periods; they must learn their jobs quickly. And if they wish to accomplish anything, they must work at a rapid pace.

The official's day varies with his or her department. For example, Secretaries or other appointed officials in State, Treasury, and Commerce are likely to spend more time than others on foreign travel. On the other hand, officials at Energy, HUD, Interior, and HEW are likely to spend more time on Capitol Hill on the behalf of Administration programs—an activity that could conceivably be undertaken more efficiently by a Member of Congress knowledgeable in the time-consuming labyrinth of the legislative process.

Cabinet officers deal extensively with individuals and groups outside their organizations. It is conjectured that they spend two-thirds of their time on external relations;¹⁵ testifying before Congress; meeting with individual legislators; preparing for congressional appearances; participating in press conferences, interviews and other media events; maintaining relations with the department's constituencies through speeches, travel, and meetings; and engaging in symbolic and political activities, especially if they have elective backgrounds.

Ultimately, it is the Member's decision as to how his or her time is to be used, where priorities are to be placed, and which demands will be met immediately, later, or possibly never. This preliminary review of the time demands on Members of Congress and those possibly entailed by executive office indicate that each of these uses of time are important by any standard but are subject to different emphases depending on the priorities the individual Member places on his or her legislative, representational, institutional, or electoral roles—much less the numerous other roles available to Members. The proposed constitutional amendment offers another role to Members, namely that of an executive official. Whether a Member deems this to be a worthwhile role to assume, given the possible costs involved, is, finally, the decision of the Member and his or her constituents.

¹⁵ Hess, Stephen. *Organizing the Presidency*. Brookings Institution, Washington, D.C., 1976. p. 36.

7. APPOINTMENT OF CABINET AND SUBCABINET OFFICIALS UNDER PROPOSED CONSTITUTIONAL AMENDMENT: THE PARLIAMENTARY EXPERIENCE

(By Judith H. Parris, Specialist in American National Government, Government Division, the Library of Congress, Congressional Research Service)

This analysis responds to certain questions raised in your letter of July 30, 1979, to CRS Director Gilbert Gude concerning your proposed Constitutional amendment, which would permit Members of Congress to serve as executive officials under specified conditions.

The proposed amendment authorizes Congress to designate up to 50 offices in the executive branch to which Members would be eligible for appointment without vacating their congressional offices. It further provides that a new President "shall submit en bloc a list" of prospective nominees to those offices, to be approved by the House and Senate before the President nominated individuals to fill the offices. If necessary in order to obtain House or Senate approval, the President could submit a revised list. Once the House and Senate had approved the list, the President then would nominate the individuals, subject to confirmation by the Senate.

You asked for an analysis of whether these procedures would delay the appointment of the Cabinet, and how a member of the Cabinet could influence the choice of subordinates if the procedures were in effect.

BACKGROUND

Since the inauguration of President Eisenhower in 1953, rapid selection of the new Cabinet has become customary, so that leaders of the incoming administration are in place as soon as possible after Inauguration Day. Presidents-elect have named their choices for Cabinet officers shortly after the November election, and Senate committees have held their confirmation hearings informally during the time between the convening of Congress on January 3 and the Inauguration on January 20. The result has been that President Eisenhower, for example, had his full Cabinet sworn in by January 23, 1953.¹ All the members of President Kennedy's Cabinet were confirmed on January 21, 1961.² President Nixon's Cabinet members were all confirmed on January 20, 1969, except for Walter J. Hickel, the Secretary of the Interior, who was not approved until January 23, 1969.³ Ten members of President Carter's Cabinet were confirmed on January 20,

¹ Senate Cabinet Confirmations. Congressional Quarterly Weekly Report, January 23, 1953 : 128-130.

² Senate Confirms 27 Top Kennedy Nominees. Congressional Quarterly Weekly Report, January 27, 1961 : 108-109.

³ Cabinet Confirmations. Congressional Quarterly Weekly Report, January 24, 1969 : 145.

1977; Joseph A. Califano was confirmed as Secretary of Health, Education, and Welfare on January 24; Griffin B. Bell, as Attorney General on January 25; and F. Ray Marshall as Secretary of Labor and Andrew Young as Ambassador to the United Nations, on January 26.⁴

Most other high-level officials of the executive branch also are nominated by the President subject to confirmation by the Senate.⁵ This group includes sub-Cabinet officials of the departments, heads of independent agencies, some top officials of agencies in the Executive Office of the President, and others. Within the Cabinet-level agencies, the question of whether the President or the Secretary has made the effective choice of subordinate officials has to some extent depended on the inclinations of Presidents (and Cabinet officials). In some instances, a President-elect has selected subordinate officials even before choosing the Secretary. For example, President Kennedy announced his intention to appoint G. Mennen Williams as Assistant Secretary of State for African Affairs on December 1, 1960; it was not until December 12 that he announced the prospective appointments of Dean Rusk as Secretary of State and Chester Bowles as Under Secretary of State. "By that time," according to authoritative commentators, "it was also known that Kennedy had offered the post of Ambassador to the United Nations to Adlai Stevenson * * *"⁶ In contrast, President Carter seems to have relied much more extensively on the judgment of Cabinet officers in the selection of subordinate officials. He made it clear that he regarded the appointments as the responsibility of the Cabinet officers. Reportedly, the White House did not veto any of the Cabinet members' selections during the opening months of the Carter Administration.⁷ With an elaborate screening process for prospective appointees involving the Federal Bureau of Investigation, the Civil Service Commission, the Internal Revenue Service, and the White House staff as well as the Cabinet members, the filling of sub-Cabinet positions in the Carter Administration took notably longer than similar appointments of previous Presidents.⁸

ANALYSIS

There appear to be a number of dimensions to the questions that you raise. The draft amendment refers to "offices in the Executive Branch, not to exceed 50 in number." It does not specify which offices, or the nature of the offices, leaving that determination to Congress. It is possible that Congress might decide to select 50 offices other than subordinate offices within Cabinet-level departments—positions as the heads of Cabinet departments or independent agencies, positions within the Executive Office of the President, or others. For these appointments, the problem of the Cabinet's role in selection would not arise.

Also, the choice of sub-Cabinet officials is ultimately a Presidential choice. The President has the Constitutional responsibility. It is the

⁴ 10 Carter Nominees Win Senate Confirmation. Congressional Quarterly Weekly Report, January 22, 1977: 105; Cabinet Confirmations. Congressional Quarterly Weekly Report, January 29, 1977: 174.

⁵ Zaritsky, Howard, and Richard Elkle. Statutory Positions Requiring Appointment by the President Showing Term, Compensation, and any other Special Provisions. CRS Report, January 1976.

⁶ Mann, Dean E., with Jameson W. Dolg. The Assistant Secretaries: Problems and Processes of Appointment. Washington, The Brookings Institution, 1965, p. 74.

⁷ Cross, Mercer. Delay on Top Jobs: Good or Bad? Congressional Quarterly Weekly Report, March 5, 1977: 398.

⁸ Ibid., p. 397.

President who sends the name to the Senate, not the Cabinet officer. While some members of the Cabinet have exercised influence in choosing their subordinates, it has been only when the President has delegated them this authority. Most Presidents have recognized a substantial advantage in retaining the appointment power for themselves. When they have delegated some of this responsibility, they have generally delegated it to the White House staff, rather than to Cabinet officers, and reserved the final decision for themselves. The role of Cabinet officers in sub-Cabinet appointments has been only what a President has permitted it to be.

Similarly, delay in the appointments process has been a matter of Presidential choice as well as Constitutional structure. Since 1952, each of the newly-elected Presidents has sought to have his Cabinet in office as quickly as possible. As a result, the Presidents-elect have moved rapidly in making these appointments. The Senate has responded by acting with alacrity on Cabinet appointments, even those that have been controversial (Charles E. Wilson in 1953, Walter Hickel in 1969, and several of the Carter appointees). As a result, every newly-elected President during this time period had his full Cabinet in office within a week of his Inauguration. However, Presidents have differed in their preferences about the speed of making sub-Cabinet appointments. As already noted, President Carter chose the slower approach, at least in part because he wanted to select well-qualified people and believed that a deliberate process was necessary to insure that end.

Under the proposed amendment, it might be good politics for a President to make a rapid selection of the slate of 50 Members of Congress and others designated to serve in the Administration. A swift selection of the group might serve to broaden the Presidential base in Congress by indicating the support of the Members who agreed to serve and the Presidential concern for Capitol Hill in making their selection a high-priority item. Such a move would seem inclined to establish a tone of fundamental good will in legislative-executive relations that might serve the President well in further dealings with Congress. Such a rapid selection would not appear to be an undue burden on the Presidency. Assembling the list of 50 names could be done well before the Inauguration; similar strategic thinking about major appointments has become customary during recent Presidential elections and transitions. The Cabinet could be selected simultaneously in order to allow its members whatever influence on the choice of affected subordinates the President wanted.

The question arises as to the precise meaning of "undue delay" in the selection of officials of the new administration. Given the recent tradition of appointment of the Cabinet within a week of the Inauguration, delay might be considered to be the failure to have the Cabinet in office by the end of January in the first year of the President's term. Given the President's power to revise the list of 50 names in the event of congressional opposition, however, "undue delay" might be construed to mean a longer period under the proposed new procedures. The issue might be discussed in hearings, report language, and floor debate on the proposed amendment.

There is little question that some delay in making the appointments would be possible if Congress chose to move at a deliberate pace. Con-

gress would have to enact a statute identifying the 50 offices before any slate of appointees could be chosen. Sending the list of 50 names to Congress for action would take time. Adding involvement of the House to the Senate's traditional role in the appointments process would provide additional opportunities for delay. Referral of the list of 50 appointees to the appropriate standing committees of the House and Senate would require the establishment of procedures in both bodies. Individual names might be referred to the appropriate authorizing committees of the Senate, as has been done for ordinary nominations; or some other procedure might be agreed to by unanimous consent. The House might refer each name to a standing committee, as has been done for Vice Presidential nominations under the 25th Amendment, or the Speaker might exercise his power to create ad hoc committees for matters involving the jurisdictions of several committees, or some other procedure might be devised. Making these procedural decisions could take time in the consideration of the initial list of 50 names. In any case, the more committees became involved, the greater the possibilities for delay. Extended debate on the list would be possible on the Senate floor, thus delaying the consideration of the individual nominees. For that reason, procedural safeguards to guarantee the consideration of the list, perhaps similar to those for the consideration of congressional budget resolutions, might be desirable.

Altogether, the problems that you anticipated appear to be real but not insuperable. Delay in approving the Cabinet and list of 50 appointees would be possible. Delay is also possible under the existing system; but even when nominations have aroused some opposition, their approval has been rapid, apparently because the feeling of good will toward a newly-elected President. Evidently it has served no one's advantage to mount a serious attempt to prevent a President from appointing the Cabinet of his choice. Thus, even though the proposed amendment would provide many new procedural opportunities for delay, it seems unlikely to occur, particularly if procedural safeguards to limit debate are built into the process. Giving Cabinet members some say in the choice of their subordinates has been a matter of Presidential discretion and probably would continue to be so under the proposed amendment. Building on past practice, an incoming President could work out well in advance of the Inauguration a leadership team that included the Cabinet and list of 50 appointees who were acceptable to appropriate Cabinet Members.

I trust that this analysis will be of use to you.

III. PRESS COMMENTS ON PROPOSED AMENDMENT

1. LET'S PUT MEMBERS OF CONGRESS IN THE CABINET

(By Richard L. Strout, *Christian Science Monitor*, July 27, 1979)

WASHINGTON. There comes across my desk this week a proposal which I thoroughly endorse, to amend the Constitution to permit members of Congress to serve, without additional compensation, in the executive branch of government. It comes from a thoughtful congressman, Henry S. Reuss (D) of Wisconsin, chairman of the Committee on Banking, Finance and Urban Affairs. In effect it would permit congressmen to serve in the President's Cabinet. It would throw a bridge over that increasingly alarming chasm, the separation of the White House from Congress.

Both President Carter and Vice-President Mondale have urged a part-way institutional rapprochement. On pages 144-145, and again on page 170, of "Why Not the Best?" candidate Carter in 1975 urged that the President's Cabinet "appear before joint sessions of the Congress to answer written questions." He said that "in England I was particularly impressed with the interrogation of the Cabinet ministers in the House of Commons and believe that it would be helpful here. . . ."

Sen. Walter F. Mondale, before he became Vice-President wrote a book, "The Accountability of Power" (1975). He watched the Cabinet question period in Canada, not England. He devoted four pages to it (148-151) observing enthusiastically, "I recently watched a question period during a session of the Canadian Parliament and came away even more convinced of the validity of the process." Mr. Mondale when he was a senator actually sponsored legislation to further his question period idea.

I defy anyone to contemplate the developments of the last three weeks in Washington without the feeling that somehow or other we must bring the executive and legislative branches of the government into closer working harmony. The need, I think, has been growing in the past half century. Things are moving faster; we need quicker decisions. A lot could be done without amending the Constitution though Messrs. Carter and Mondale have done little to advance their promising proposal for Cabinet question time in Congress.

Now comes Mr. Reuss with a much more radical proposal. Why shouldn't some members of the presidential Cabinet be selected right out of Congress itself, as they are in Canada and England, and every other parliamentary democracy?

The obstacle is Article I, section 6 of the Constitution, which flatly prohibits members of Congress from being "officers" of the United States—Cabinet or sub-Cabinet officials. "All the other major demo-

cratic government systems . . . have governments comprised of leading legislators," Mr. Reuss notes.

It was a Frenchman, Montesquieu, who invented the separation of powers, and checks and balances. America was afraid of monarchy and George III. A legitimate fear at the time; but today the danger may be a government deadlock and stalemate where the public's furious clamor for a "strong" president breaks through the orderly democratic process.

The Reuss idea deserves discussion. It isn't the parliamentary system. Selection of the chief executive would still be by the people (or at any rate, the electoral college) and not the legislature; and there would be no power of the legislators to topple the government at any time by a no-confidence vote. As Mr. Reuss puts it:

"The American people feel that their government—President and Congress—is failing them, and they're right. This President, and others before him, has not been governing effectively, because some of his associates lack skill in the art of government. Congress in turn, frustrated because of its inability under the Constitution to fully participate in decisionmaking on vital questions like inflation, energy, and unemployment, increasingly diverts itself with empire building, public relations grandstanding, and niggling, piddling quarrels with each other and the President."

Maybe they would work better together if more closely joined. It's an interesting idea. If there's a better solution what is it?

2. SPLIT OF TOP OFFICE WOULD CURB PERFORMANCE

(By Stephen Hess,¹ San Diego Union, September 30, 1979)

Life in the Republic isn't going well at the moment, which is usually the time when some people come forth with proposed "reforms," implying that they know how to do things better. One reformer who always leaves me breathless is Congressman Henry S. Reuss, Democrat of Milwaukee.

Several years ago his solution to the problem of presidents being overburdened with frivolous duties—and thus not having enough time to devote to the serious matters of governance—was a constitutional amendment to create a chief of state.* In addition to having a president, the United States would also get a sort of Queen of England, who would be around to cut ribbons and hold teas.

What's wrong with this Reuss plan is that the ceremonial functions of the presidency are not inherently time-consuming. Presidents spend as much time as they do on such activities because they enjoy them (Presidents, too, deserve to have some fun), and because symbolic rewards (like being invited to a White House dinner) have become important "bargaining chips" in gaining support from legislators and constituent groups.

Now Representative Reuss has come up with a new proposal for another constitutional amendment. This one is designed "to bridge the gap between Congress and the Executive." Reuss wants Congress to be able to designate up to 50 offices in the executive branch that could be filled with members of the Senate and the House of Representatives. Legislators chosen for any of these jobs would retain their seats in Congress.

Reuss thinks that "strict separation of powers, while appropriate in 1789, may no longer be the best basis" on which to run an "infinitely larger and more complex government." He says that his amendment would "emphasize cooperation rather than stalemate." He also thinks that it "would make service in Congress more attractive."

The proposal is a new wrinkle in an old tradition. George Pendleton in 1864 proposed seats in Congress for certain members of the president's cabinet. The idea was not that the cabinet should come from Congress, but rather that the cabinet should be added to Congress.

Reuss' amendment is more like a limited version of a plan that Woodrow Wilson devised when he was still a senior at Princeton. The future president suggested that the entire cabinet be made up of sitting members of Congress. Such thoughts have been so intriguing over the years that Stephen Horn, in his book, "The Cabinet and Congress" (Columbia University Press, 1960), is able to list 47 congressional

¹ Stephen Hess is a senior fellow of the Brookings Institution in Washington, D.C. He was a member of the White House staff in the Eisenhower and Nixon administrations.

bills that have been introduced to change the relationship between Congress and the cabinet.

Why am I so offended by the Reuss proposal? Is it that I feel a reverence for the Constitution? After all, as Reuss points out, things that were once appropriate need not always remain appropriate. Is it because I know that unanticipated consequences will flow from this change? If this reasoning is to govern our behavior, no changes would ever be made.

No, I feel I have more serious objections.

The doctrine of strict separation of powers is right. Members of Congress should be answerable only to their constituents, and not to the president as well. The "conflict" built into our system may be confusing and troubling, but in the long run it is more useful than whatever additional "cooperation" might result from the Reuss plan.

Congressman Reuss makes his suggestion because "government is not working as well as it could." True, but I doubt that his proposal addresses the real reasons why this is so. The intransigence of Congress certainly has created problems for Jimmy Carter. Yet neither has Mr. Carter displayed much skill in his dealings with the legislature. Nor is this the basic cause of Mr. Carter's failure to perform as a forceful leader.

The Reuss plan may not make any sense to me, but it is not the silliest idea we will be exposed to at this moment when life is not going well in the Republic.

Serious suggestions for ways out of our difficulties should get serious consideration. Yet before we rush into reconstructing our major institutions, let's remember that this is panacea time—again.

HENRY S. REUSS COMMENTS ON STEPHEN HESS

ARTICLE*

In 1975, I introduced the amendment Mr. Hess discusses. As he says, it would have created an elective office of Chief of State. In such an office would have been placed the symbolic and ceremonial functions which impose such a heavy burden on the time and energy of the President under our present constitutional system.

Mr. Hess suggests that the President performs his ceremonial duties for enjoyment and as bargaining chips. There is some truth to the latter reason, but my amendment would not have precluded the President from social functions he felt to be important to his substantive duties. It would merely have freed him from those purely ceremonial duties which devolve upon him because of his role as the nation's Chief of State.

I think that Mr. Hess overstates the fun that Presidents derive from these ceremonial duties. Wiley Buchanan and James Symington, protocol chiefs in the Eisenhower and Johnson administrations, respectively, have both reported on the attempts of those two presidents to reduce the time spent receiving foreign diplomats, a duty imposed on the President by the Constitution.

Clinton Rossiter, an authority on the Presidency, underlined the fact that the President's ceremonial function is, as the office is now constituted, an intrinsic part of the job:

First, the President is Chief of State. He remains today, as he has always been, the ceremonial head of government of the United States, and he must take part with real or apparent enthusiasm in a range of activities that would keep him running and posing from sunrise to bedtime if he were not protected by a cold-blooded staff. Some of these activities are solemn or even priestly in nature; others through no fault of his own are flirtations with vulgarity. The long catalogue of public duties that the Queen discharges in England, the President of the Republic in France, and the Governor-General in Canada is the President's responsibility in this country, and the catalogue is even longer because he is not a king, or even the agent of one, and is therefore expected to go through some rather undignified paces by a people who think of him as a combination of scoutmaster, Delphic oracle, hero of the silver screen, and father of the multitudes.

As figurehead rather than working head of our government, he greets distinguished visitors from all parts of the world, lays wreaths on the tomb of the Unknown Soldier and before the statue of Lincoln, makes proclamations of thanksgiving and commemoration, bestows medals on flustered pilots, holds state dinners for the diplomatic corps and the Supreme Court, lights the nation's Christmas tree, buys the first poppy from the Veterans of Foreign Wars, gives the first crisp banknote to the Red Cross, throws out the first ball for the Senators (the harmless ones out at Griffith Stadium), rolls the first eggs for the Easter Bunny, and in the course of any month greets a fantastic procession of firemen, athletes, veterans, Boy Scouts, Campfire Girls, boosters, hog callers, exchange students, and heroic school children. The annual United Fund Drive could not possibly get underway without a five-minute telecast from the White House; Sunday is not Sunday if the President and his lady skip church; a public-works project is not public until the President presses a silver key in Washington and explodes a charge of dynamite in Fort Peck or Hanford or the Tennessee Valley.

The President is not permitted to confine this sort of activity to the White House and the city around it. The people expect him to come to them from time to time, and the presidential grand tour, a precedent set conspicuously by George Washington, is an important aspect of the ceremonial function. Nor is this function, for obvious political and cultural reasons, unstained with commercialism. If it isn't one "Week" for him to proclaim or salute, it's another, and what President, especially in an election year, would turn away the Maid of Cotton or the Railroad Man of the Year or, to keep everybody happy, the Truck Driver of the Year from the White House door?

The activities Rossiter describes necessarily intrude on the President's burden of substantive duties, a burden which previous Presidents have described as crushing in itself and which is, after all, the President's main job.

Woodrow Wilson once said that the Presidency "requires the constitution of an athlete, the patience of a mother, the endurance of an early Christian." Harry Truman called the job "like riding a tiger. A man has to keep riding or be swallowed."

From the very beginning, Presidents have groaned at the severity of the burden imposed on them by the oath of office. Washington called the duties of the office "arduous"; Adams called them "oppressive"; and Jefferson called them "drudgery".

As James Monroe was about to leave the White House, he sent Congress "a few remarks . . . founded on my own experience, in this office. Beyond a certain limit", he wrote, "no one can go. If unimportant details are forced upon the attention of the President, he loses the time he ought to devote to matters of greater importance. The higher duties of his office", said Monroe, "are sufficient to employ the whole mind, and unceasing labors, of any individual . . ." Among these duties he cited the message to Congress, the replies to calls for information, personal contact with members of Congress, and "the supervision and control of the several departments so as to preserve efficiency in each, and order and consistency in the general movement of the Government." Monroe was one of the first to suggest the desirability of aid to the President.

In December, 1848, President Polk made this entry in his diary :

The public have no idea of the constant accumulation of business requiring the President's attention. No President who performs his duty faithfully and conscientiously can have any leisure. If he entrusts the details and smaller matters to subordinates, constant errors will occur. I prefer to supervise the whole operations of the Government myself rather than entrust the public business to subordinates, and this makes my duties very great.

The task undermined Polk's health, and he died shortly after leaving the White House.

President Cleveland wrote: "I do not want the office. It involves a responsibility beyond human strength to a man who brings conscience to the discharge of his duties."

Benjamin Harrison said: "... and it is a rare piece of good fortune during the early months of an administration if the President gets one wholly uninterrupted hour at his desk each day. His time is so broken into bits that he is often driven to late night work, or to set up a desk in his bedroom when preparing a message or other paper requiring unbroken attention."

President Taft said: "I have come to the conclusion that the major part of the work of a President is to increase the gate receipts of expositions and fairs and bring tourists into the town."

Coolidge wrote:

The duties of the Presidency are exceedingly heavy. The responsibilities are overwhelming. But it is my opinion that a man of ordinary strength can carry them if he will confine himself very strictly to a performance of the duties that are imposed upon him by the Constitution and the law. If he permits himself to be engaged in all kinds of outside enterprises, in furnishing entertainment and amusement to great numbers of public gatherings, undertaking to be the source of inspiration for every worthy public movement, for all of which he will be earnestly besought with the inference that unless he responds civilization will break down and the sole responsibility will be on him, he will last in office about 90 days.

President Hoover complained:

Another of these useless exhaustions, which had always plagued Presidents, was signing routine paper. No man could read them even on a twenty-four-hour shift. They comprise all military officers' commissions, many appointments of civil servants, Treasury orders, documents relating to the guardianship of individual Indians, pension authorities, etc., all of which the President could only sign on the dotted line and trust to Heaven and his Cabinet officers that they were all right.

President Truman reflected on "the weight of its unbelievable burdens," referred to the Presidency as a "man-killer," and concluded that "the pressures and complexities of the Presidency have grown to a state where they are almost too much for one man to endure."

In his memoirs Truman wrote:

I have learned that one of the hardest things for the President to do is to find time to take stock. I have always believed that the President's office ought to be open to as many citizens as he can find time to talk to; that is part of the job, to be available to the people, to listen to their troubles, to let them share the rich tradition of the White House. But it raises havoc with one's day, and even though I always got up early, usually was at work ahead of the staff, and would take papers home with me at night to read, there always seemed to be more than I could do.

President Eisenhower said:

Of course, the duties of the President are essentially endless. No daily schedule of appointments can give a full timetable—or even a faint indication—of the President's responsibilities. Entirely aside from the making of important decisions, the formulation of policy through the National Security Council, and the Cabinet, cooperation with the Congress and with the States, there is for the President a continuous burden of study, contemplation and reflection.

Having an elected Chief of State would free the President from many of the draining ceremonial functions which now occupy much of his time, such as receiving ambassadors, presiding at state dinners, cutting the dedicatory ribbon. The Founding Fathers rightly saw these ceremonial functions focused on George Washington, the Father of his Country. They could not envisage the myriad of demanding duties of today's head of government—chief of our defense and world policy, guarantor of full employment without inflation, party leader, legislative participant.

Amending the Constitution to create an office of Chief of State of the United States would be beneficial in another way. Not only would it significantly lighten the tremendous strain on the time and energy of the President by relieving him of onerous ceremonial duties such as attending funerals of other chiefs of state abroad, hosting visits of foreign chiefs of state, accepting credentials of foreign envoys, and so on, but it would reduce the tendency to deify Presidents, to render them immune to criticism, to make them our elected Kings. The rise of the "imperial presidency" during this century has posed a serious

threat to the proper functioning of the checks and balances provided in the United States Constitution. Separation of the roles of Chief of State and Chief Executive would help to demystify the Presidency and to dispel the undemocratic attitude that "the King can do no wrong."

The national symbolism attached to the Presidency has been developing since the early days of the Republic. The late Henry Jones Ford, in his book, "The Rise and Growth of American Politics," wrote:

In the Presidential office as it has been constituted since Jackson's time, American democracy has revived the oldest political institution of the race, the elective kingship. It is all there: The prerecognition of the notables, and the tumultuous choice of the freemen, only conformed to the modern conditions.

If he had wished to cite examples, Ford might have mentioned the elaborate ritual of the inauguration suggestive of the coronation, the 21-gun salute on arrival and departure of the President, and the throngs that gather to see and hear him.

Long before Ford's observation, Lincoln's Secretary of State, William H. Seward, answered an inquisitive English newspaper correspondent:

We elect a king for four years and give him absolute power within certain limits, which after all he can interpret for himself.

The symbolism and reverence attached to the Presidency is an outlet for the same human emotion that Britons feel toward their monarch. As one British author put it:

Certain it is that democratic government is not merely a matter of cold reason and prosaic policies. There must be some display of colour, and there is nothing more vivid than royal purple and imperial scarlet. During the present century, therefore, we have placed almost intolerable burdens on the royal family. They must not only head subscription lists and appear on State occasions; they must, also, inspect this and that, open this and that, lay this stone and that, and undertake a thousand other dull tasks in a blaze of publicity. We can hardly blame Edward VIII if he preferred to make toffee in the kitchen.

The English monarch is kept busy fulltime with ceremonial duties, but the President of the United States must somehow find time to perform his duties as Chief Executive, party leader, and Commander in Chief as well.

The fact that custom has imposed upon the President extraofficial burdens similar to those of royalty is indicative of the symbolism of the President. By and large, he symbolizes the American Government to the American people.

The United States is the only modern democracy in which the ceremonial and symbolic functions of Chief of State, and the political and administrative functions of Chief Executive are combined in the same Office, the Presidency. In constitutional monarchies such as Great Britain, Japan, the Netherlands, and the Scandinavian countries, the royal family exercises the symbolic and ceremonial functions of Chief of State, but is expected to maintain political neutrality, while party leadership and administrative responsibility are vested in the head of government, the prime minister or premier. In the absence of a monarchy, as in Israel, West Germany, Italy and France, an elected President, who cannot be a member of Parliament, performs the symbolic and ceremonial functions.

The Congressional Research Service informs me that in 45 of the world's 152 countries, the head of state is largely ceremonial. In most Latin American countries the President as Chief of State is the chief executive officer. In some African countries the chief executive holds both the offices of President and Prime Minister.

All European constitutional monarchies follow the British model, and throughout the British Commonwealth a Governor General as the representative of the Queen performs many ceremonial functions and stands at the top of the list of officials. In many Communist countries the Chief of State is largely ceremonial, with power resting with the Party Chairman, though in the case of Yugoslavia, Romania, Mongolia, and the People's Republic of China the Head of State is also head of the party and the center of power.

Of the States with largely ceremonial Chiefs of State, 21 are members or former members of the British Commonwealth, 9 are constitutional monarchies—outside of the Commonwealth—8 are parliamentary democracies, and 7 are Communist countries.

And so today perhaps we may need two people for what are essentially two jobs—head of government, and Chief of State.

3. DO WE NEED BOTH PRESIDENT AND CHIEF OF STATE?

(By Henry S. Reuss,¹ San Diego Union, September 30, 1979)

Our Constitution is approaching its 200th anniversary. Its durability attests to the timeless principles of government it laid down.

But no consitutional document is above reexamination. Fortunately, we have reexamined our basic document from time to time, with good results—the Bill of Rights in 1791, the Equal Rights Amendments of the 1860s, the direct election of senators in 1913, and the extension of the vote to women in 1920 and to young people in 1971.

With the Constitutional's bicentennial looming ahead, it may be a good idea to look again at our national charter, to discuss what changes, if any, are needed to bring our form of government closer to the ideals of the framers two centuries ago. Could it be that the problems of world peace, of energy, of inflation, and of recession have grown so complex that they strain the capacity of a governmental structure that seemed fit and serviceable back in 1787?

In this spirit, I have proposed for discussion two such possible changes. I welcome Mr. Hess' contribution to this dialogue, and I commend The San Diego Union's willingness to bring the discussion before its readers.

A first suggestion for discussion is that we join the world's other democracies in having, in addition to our President—the head of our government—a Chief of State. The Chief of State would be the ceremonial leader of the country—symbol of the nation's most deeply held and cherished moral and political values.

Having an elected Chief of State would free the President from many of the draining ceremonial functions which now occupy much of his time, such as receiving ambassadors, presiding at state dinners, cutting the dedicatory ribbon. The Founding Fathers rightly saw these ceremonial functions focused on George Washington, the father of his country. They could not envisage the myriad of demanding duties of today's head of government—chief of our defense and world policy, guarantor or full employment without inflation, party leader, legislative participant.

And so today perhaps we need two people for what are essentially two jobs—head of government, and Chief of State.

A second suggestion for constitutional change is that we allow members of Congress to serve in executive branch positions without relinquishing their seats. Our system alone in the democratic world, prohibits members of the legislature from being cabinet and subcabinet officials.

¹Reuss, a Milwaukee Democrat, represents Wisconsin's Fifth District in the U.S. House of Representatives.

Many Americans feel that their government—President and Congress—is failing them. Presidential appointees are often perceived as lacking skill in the art of government. Congress, in turn, is frustrated because of its inability under the Constitution to participate fully in decision-making on vital questions like inflation, energy and unemployment. Increasingly, Congress diverts itself with empire-building, public relations grandstanding and piddling quarrels with each other and the President.

The point of the proposal is to lessen destructive conflict between the President and Congress and emphasize cooperation rather than stalemate. Into the executive's administration of the country would be factored the legislator's understanding of compromise, of representation and reconciliation of diverse interests, and the grasp of the legislative process which is often obscure to the executive. And service in the legislative branch would be made more attractive by giving members a chance to hold posts of executive responsibility without interrupting their congressional careers.



Chet Josinski drawing

Henry S. Reuss

Strict separation of powers was written into our Constitution to overcome the spectre of domination by an unfettered executive. We were wise then and are wise now to diffuse governmental power and to impose restrictions to keep it diffused.

But, 200 years later, we often find ourselves unable to act cohesively, or even to decide on the direction in which we should be moving. The inevitable result has been stalemate, paralysis and inaction. And the fruit of our inaction has been that the problems have just gotten worse, and more difficult to solve.

It is easy to attribute legislative-executive conflict to an outsider president unschooled in the ways of Congress. But the fact is that this conflict, and the resulting stalemate, have been the hallmark of most of the post-World War II presidencies, five of which were headed by former long-time members of Congress.

In truth, the executive's responsibility to administer the country, and the collective and individual responsibilities of the 535 members of Congress to represent their respective constituencies and to legislate national policy, engender differing and often conflicting perspectives. The proposed amendment proposes to introduce into the executive men and women who can give legislative perspective to administration policies, and to include in the Congress a leavening of the administrative point of view. The crossfertilization could breed understanding and more effective problem-solving.

It could do this, furthermore, without significantly impairing our separation of powers. The amendment would not do away with a single prerogative of either branch. Congress' legislative and budgetary powers would be untouched, as would the President's authority to appoint to government positions men and women of his own choosing, to conduct foreign policy, to sign or veto legislation.

4. TINKER, TINKER

(Editorial, The Arizona Republic, July 28, 1979)

Just as Congress disposed of other attempts to trifle with the U.S. Constitution, so too should it swiftly dispose of the idiotic proposal being floated by Rep. Henry S. Reuss.

The Wisconsin Democrat is proposing that the Constitution be amended to allow members of the House of Representatives and the U.S. Senate to also hold simultaneous posts in the Executive Branch.

Up to 50 posts in the Executive Branch would be open to senators and representatives under the Reuss proposal.

And how does Reuss justify abolishing the stringent separation of powers of the three branches of government?

He says Congress feels "frustrated" by its inability to "fully participate in decision-making on vital questions."

Congressman Reuss obviously needs a rest from the summer heat in Washington. He has totally lost sight, in his frustration, to comprehend the gravity of his proposal.

The checks and balances that now exist between the executive, legislative and judicial branches would be blurred into oblivion.

It would be possible, for example, for Reuss himself to retain his position as chairman of the House Committee on Banking, Finance and Urban Affairs, and also accept an appointment as Secretary of the Treasury. He could propose monetary policy as Treasury secretary, then run over to the House and write a bill and vote on it.

Sen. John Stennis, D-Miss., might also be named Secretary of Defense, and then run back over to the upper chamber and resume his role as chairman of the Armed Forces Committee.

We suspect Rep. Reuss might realize the folly of his proposal if someone were to suggest that members of the Executive Branch—such as Hamilton Jordan and Ambassador Andrew Young—should also be empowered by the Constitution to sit as members of Congress.

Reuss' proposal to tamper with the Constitution is the latest in a long line of imbecilic endeavors.

Attempts to tack on amendments requiring balanced budgets, prohibiting school busing and abolishing the Electoral College have been scrapped.

The Reuss amendment would provide a sitting president with awesome powers—powers to pack key administration posts with congressmen and senators friendly to White House programs.

The day of yes-men government will then finally have arrived.

There is nothing wrong with the document that created the system that governs the United States. But, as Rep. Reuss has demonstrated, there may be something faulty about some who serve in that government.

HENRY S. REUSS COMMENTS ON PROFESSOR MILLER'S LETTER*

As Professor Miller indicates, in 1974 I introduced a Constitutional Amendment to allow Congress, by an extraordinary three-fifths majority, to vote "no confidence" in the President, and thus compel a prompt election to test the mandate of the people. The special election would have had to be held within 90-110 days after the passage of the No Confidence resolution, and the Vice President and Members of Congress would have to stand for re-election in the same election.

In late 1973 the pyramiding of scandal called Watergate thrust us into a constitutional crisis, raising the problem of how the United States is to be well governed, or perhaps governed at all, when the President is deemed to have lost the confidence of the Congress and the public, but refuses to step aside for the good of the country. It was clear that the people were convinced that President Nixon had lost the moral authority needed to lead. They had lost faith in him and his administration. But they drew back from the trauma of impeachment. In the absence of a viable alternative, they preferred a crippled Executive to the dimly-perceived evils they feared lurking throughout the impeachment process.

Finally President Nixon resigned. But not before subjecting the country and the government to almost a year of a virtually catatonic White House. We were fortunate that the country escaped from that year without requiring the sort of executive action of which the administration appeared incapable.

In the aftermath of the trauma of five years ago, it seems clear that the necessity exists to develop an alternative method of removing the President—one that lets the people make the ultimate decision. A parliamentary system has that alternative, of course. When the government loses the confidence of the people and of the legislature, it falls, and recourse is had to a new judgment of the people.

The Constitution's framers recognized the necessity of, in Hamilton's words, "auxiliary precautions", such as impeachment, to augment "dependence on the people", the "primary control on government". But the framers also structured the powers conferred in the Constitution to include an intricate system of checks and balances. Impeachment, as we saw five years ago, is so frightful a remedy as not to be readily invoked.

If we recur to Hamilton's "dependence on the people" as "the primary control on government," we must provide a mechanism by which vigor and health and moral authority can be restored to a crippled Executive.

While the vote of no confidence is new in the U.S. system, it is by no means a radical proposal. It is common to parliamentary systems, and its development in England preceded the American Revolution. To adopt the no-confidence procedure would be a long way from adopt-

ing the total parliamentary system, however, since the new government to emerge from the election would be the American Presidential government, not a British parliamentary prime minister-cabinet system.

The amendment was not intended to make, and did not make, a vote of no confidence something easily achieved. An extraordinary three-fifths majority would have been required. Congress would have had to stand for reelection with the challenged President, a Congress vulnerable to the criticism that they had acted vindictively or on trivial grounds.

More important than the actual removal of a President under the proposed amendment would have been the existence of a power to remove. This would have served as a check on Presidential arrogance, and induced a President to consult and cooperate with the Congress. It would have helped to check the erosion of congressional power by a President—excessive delegation of powers to the President, use of Executive agreements not requiring ratification rather than treaties, making war without congressional approval, impoundment of funds, indiscriminate use of Executive privilege. Both the Presidency and the Congress would be strengthened in the process.

Since I introduced the proposed amendment Congress has acted to deal with some of the abuses mentioned above. I like to think the amendment was part of the ferment which produced the remedies. Other abuses remain potential, and I hope the 1974 amendment and the present proposed amendment on executive service by Members of Congress will contribute to a continuing dialogue on how these abuses might be dealt with.

IV. COMMENTS ON PROPOSED AMENDMENT BY SCHOLARS IN LAW AND POLITICAL SCIENCE



THE
GEORGE
WASHINGTON
UNIVERSITY

Washington, D.C. 20052 / The National Law Center

as from --

1106 Fleming St.
Key West, Fla. 33040

7th August 1979

Rep. Henry S. Reuss
2413 Rayburn Office Bldg.
House of Representatives
Washington, D.C. 20515

Dear Congressman Reuss:

Your letter dated 30th July, with your proposed constitutional amendment, was forwarded to me here in Key West. My comments on your proposal are as follows:

a. I believe you are entirely correct in saying that separation of powers theory needs rethinking in the light of present conditions. I have written several articles in legal and political science journals along those lines. One is enclosed: "Separation of Powers: Does It Still Work?", 48 Political Quarterly 54 (1977). You may also wish to look at Chapter 7 of my newly published book, Social Change and Fundamental Law: America's Evolving Constitution (Greenwood Press, 1979); that chapter is entitled: "Separation of Powers: An Ancient Doctrine Under Modern Challenge." And see my Presidential Power (West Publishing Co., 1977). My views on the question you pose are set out in those references (and others, the citations to which I could furnish if you wish).

b. My agreement with your concern about separation of powers, however, emphatically does not lead me to agreeing with your proposal. I fear that I see no merit in it. I simply cannot see how your amendment would eliminate what you call the "executive-legislative stalemate." Quite the contrary: your proposal would simply make government more complex; it would exacerbate, rather than eliminate, conflicts between the branches.

c. I still favor your previous proposed amendment for a "vote of confidence" on the President and Congress.* It is more sweeping, of course, but it gets to the nub of the problem, in my judgment. My recommendation is that you resurrect that proposal and submit it to the Congress.

I shall be happy to expand on these remarks if you wish.

Sincerely,

Arthur S. Miller
Professor, Emeritus of Law

Enc.



HARVARD LAW SCHOOL

CAMBRIDGE · MASSACHUSETTS · 02138

3 August 1979

Honorable Henry S. Reuss
House of Representatives
2413 Rayburn House Office Building
Washington, D.C. 20515

Dear Henry:

Just a hasty reply to yours of July 30, dictated just before I take the plane for ten days in Switzerland. I will write you at more length come September.

Your suggestion has much appeal for me. Do you recall reading Tom Finletter's little book, CAN REPRESENTATIVE GOVERNMENT DO THE JOB." Tom was, as you know, a passionate Anglophile. We talked out together many of the ideas in the book during a spell in which he was being given the isolation treatment by the powers in the State Department.

You may also be interested to know that in 1974-75 most of the British to whom I talked during my year at "the other Cambridge" held the opinion that the United States handled Watergate much better than the British system of government could have done but that the cabinet system rendered such events much less likely to occur. Note that I say "cabinet system" and not "Parliamentary system." Our Presidency suffers most from the fact that the President is surrounded by men solely dependent upon his whim instead of men who have their own constituencies and sources of power.

Something along your lines probably offers the best cure for that evil, and also a way of lessening the conflicts resulting from total separation. I suspect that I would quarrel with some of your details, but I will try to put my mind on those when I get back here next autumn.

It is good to hear from you once again.

All the best,

Sincerely,

Archibald Cox

AC:has



The Graduate School and University Center
of the City University of New York

Albert Schweitzer Chair in the Humanities
Graduate Center, 33 West 42 Street, New York, N.Y. 10036
212 790-4261

September 4, 1979

Honorable Henry S. Reuss
The House of Representatives
Washington, D.C. 20515

Dear Henry:

I have just returned from Europe to find a copy of your proposed constitutional improvement. It is no doubt my historian's prejudice; but I don't think our problems are amenable to structural solutions. Would the Carter administration be any better off, for example, if your amendment were in effect? On the whole, I think the present Constitution has served the republic well; and I agree with Burke that digging into the foundations of the state is always a dangerous adventure. What we need is not constitutional reform but a President who understands his job.

Best,

Arthur Schlesinger, jr.

UNIVERSITY OF CALIFORNIA, DAVIS

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SANTA BARBARA • SANTA CRUZ

DEPARTMENT OF POLITICAL SCIENCE

DAVIS, CALIFORNIA 95616

August 9, 1979

Congressman Henry S. Reuss
 2413 Rayburn House Office Building
 Washington, D.C. 20515

Dear Congressman Reuss:

Your letter of July 30 shows that you continue to question the adequacy of our present constitutional arrangements. I continue to revere the principle of constitutionalism or limited government. But events since my book appeared in 1974 have strengthened my conviction that our constitutional framework is seriously flawed. The magnitude of the military, economic, and social problems that unremittently confront us and the dizzying rapidity of change in the intensity, configuration, and mix of problems -- all require a concentrated, cohesive, and coherent government that our classical brand of the separation of powers denies us.

Your proposal to permit Congressional leaders to serve in the Executive is imaginative and well-directed. Indeed, I find its possibilities exciting. It aims to bridge the separation of powers which, as your earlier espousal of the principle of the vote of confidence recognized, is at the root of our difficulties. With respect, however, I am sorry that your explanatory statement, top of p. 2, reads "The Amendment would do what needs to be done, and no more." I agree that we should do as little as possible. But the shortcomings of our present system create problems that are infinitely more important, complex, and profound than, say, our energy problem which, we are told daily, is exceedingly intricate.

What you propose is nothing less than to link Congress and the Executive through opening a bridge so that those legislators who aspire to share in the collective, synthesizing, and coordinating role of government -- peculiarly an executive function -- will be able to do so. The relationship between this group of legislators, individually and collectively, with Congress will be a matter of first importance. Although you are careful to note that the "vote of confidence" is not included in this recommendation, there is no better word than confidence to describe the relationship that you must wish to nourish between the legislative and the executive branches. Your present proposal would create a situation in which the need for a vote of confidence would, I hope, become clear. Institutions do evolve, and that would be a benign result.

Congressman Henry S. Reuss
August 9, 1979
Page 2

I applaud your requirement of Congressional approval of the slate of "legislative-executives." But I regret your retention of confirmation of the designees by the Senate. I understand how difficult it would be to eliminate Senatorial confirmation. But there is absolutely no reason for the Senate to have a special right with regard to these appointees. Indeed, as one looks down the road to the possible emergence of a vote of confidence, there is every reason for vesting the right in the more numerous House that is more closely representative of the population. In parliamentary countries where the vote of confidence is of central importance, there has, I believe (and I shall get some information for you on this point, if you desire) been a decided movement in favor of limiting the vote of confidence to the first or "lower" House. Again, I realize that I am talking about a development that you are probably not contemplating now, but I am thinking in evolutionary terms.

The evolution could, however, proceed in a less happy direction. One of the recent curses to afflict us, to adapt a phrase of the late Justice Cardozo, is "pluralism running riot." If your proposal were accepted, the "worst case" would be an all-out effort by every conceivable group and caucus in Congress and in the country to use it to "colonize" the Executive. If this happens then the group of "legislative-executives" would merely create in the Executive another cauldron of the ~~disintegrative~~ and contentious forces that are presently tearing not only the Democratic party but even the polity apart. The antidote to this can only be in stronger, much stronger, political parties. You are right to raise the question, What would the proposal do to "party discipline"?

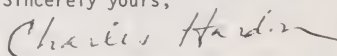
In this vein, and referring to the first paragraph of your explanatory statement, I must take exception to your phrase, "the home town touch." I know that this is like objecting to apple pie a la mode. But we are suffering today from an excess of governmental responses to a staggering array of interests and pressures, many of them distinctly local. My conviction is growing that we should reduce government's effort to correct every conceivable "maladjustment" and to right every individual "inequity." I say this out of the experience of observing, especially in agricultural policy, that a relatively small and privileged group usually winds up receiving the bulk of governmental favors. I think that we should help real hardship cases and also work for equality of opportunity. At the same time I believe more and more that we should let the market operate while government concentrates on the strategic levers of fiscal and monetary policy. Your own distinguished career seems to me to vindicate these principles.

The kind of policy I propose requires a government strengthened to resist pressures. Again this seems to me to call for stronger political parties. I should even suggest that you consider the wisdom of providing some immunization from the "home town touch" for those legislators who seek to serve in the Executive. Without forgetting the need for individual constituencies to be represented in the legislature (hopefully in the Burkeian sense), the "legislative-executives" will aspire to share in the operation of government from

the executive or presidential perspective. In addition to the usual tensions and conflicts with which public men and particularly legislators must live, these persons will have additional tensions derived from their membership in the Executive while they continue to serve in Congress. It would be good for them and for the country to provide that, if they lost a nomination or an election in one district, they could not be debarred either by Constitutional or statutory provisions from running in another that was willing to adopt them. Of course, this suggestion, to be operative, would also require stronger, more centralized political parties.

Thanking you for the opportunity to comment, I am,

Sincerely yours,

A handwritten signature in cursive script that reads "Charles M. Hardin". The signature is written in dark ink and has a fluid, somewhat stylized appearance.

Charles M. Hardin
Professor Emertius

JONES, DAY, REAVIS & POGUE

1100 CONNECTICUT AVENUE, N.W.
WASHINGTON, D. C. 20036

August 2, 1979

Hon. Henry S. Reuss
2413 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman,

This is written in response to your letter of July 30th, relating to a proposed constitutional amendment. I am glad to hear from you.

For what it is worth, my reaction is quite adverse. Indeed, I cannot think of any proposal which, in my view, would be more disruptive of an effective government than the plan embodied in this proposed amendment.

From my experience in government, I would say that we do not need more Congressional interference in the day-to-day operations of government. What we do need, and badly, is more effective operation of Congress, and more responsibility there.

The analogy suggested in the memorandum from your office that there is some relation between this proposal and parliamentary government seems to me to be quite unsound. It is true that, in Great Britain and elsewhere, members of Parliament are heads of executive departments. However, they are the responsible heads. They operate under the restraints of the Cabinet, presided over by the Prime Minister, and they stay in office only as long as the Prime Minister can maintain a majority in Parliament.

Under your proposal, members of Congress holding office in the Executive Branch would be completely irresponsible in the parliamentary sense. They could stay there a long time

JONES, DAY, REAVIS & POGUE
WASHINGTON, D. C.

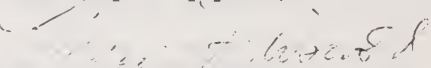
Hon. Henry S. Reuss
August 2, 1979
Page Two

without any test of confidence. Moreover, they could (and often would, I am sure) make it quite impossible for the President to meet his responsibilities as the head of the Executive Branch. This is true, because, obviously, such responsibility as they would have would be to Congress, and not to the President.

There are needs for improvements in the structure of our government, but this one does not seem to me to be one of them. I am sorry to send this negative response, but you asked for my views and this is my reaction to the proposal.

With best wishes,

Very truly yours,


Erwin N. Griswold



HARVARD LAW SCHOOL

CAMBRIDGE · MASSACHUSETTS · 02138

August 6, 1979

Hon. Henry S. Reuss
Rayburn House Office Bldg.
Washington, D.C. 20515

Dear Congressman Reuss,

I appreciate the opportunity you have given me to comment on your proposed constitutional amendment to qualify Members of Congress for appointment in the Executive Branch.

It is an interesting proposal, directed at a growing lack of coordination that threatens the functioning of our system. If the observation of Lord Bryce was ever true, that the American system is all engine and no brake, it surely would not be ventured today.

After agreeing that a serious problem exists, I have some difficulties with the specific remedy suggested, difficulties that are indeed foreshadowed in the questions put in your office memorandum of July 23. I am sceptical of any plan that pulls one thread out of a complex pattern -- the parliamentary system -- and seeks to place it in a system with a quite different texture. The dual office-holding in the British system is a product of a political universe where candidates are selected by a central party apparatus, where there is strong party discipline, where the committee system is at best rudimentary, where there is no nationally elected executive -- where, in short, the power centers are in the Cabinet and the majority in the Commons is expected to support government measures unless and until a new election, based on lack of confidence, is forced.

In the United States, a set of Members of Congress holding executive office would find themselves in an ambiguous position in relation to their Congressional colleagues on the one hand and the President on the other. Unless they held a secure legislative seat, they might find themselves vying for attention and power with committee and sub-committee chairmen, and also reluctant to take immediately unpopular positions on behalf of administration-sponsored measures. These extraneous pressures would be all the greater because presumably a Member of Congress holding an executive post would suffer in his constituency relations by reason of his divided time and more specialized functions.

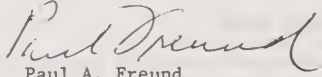
These apprehensions might prove unfounded or exaggerated, yet they do suggest the wisdom of exhausting other, formal and informal, means of coordination before resorting to a constitutional amendment. On the executive side, a few retired or resigned Members of Congress, as well as certain elder statesmen, might be appointed to serve as assistants to the President for

Congressional relations, each assigned to particular functional areas. On the Congressional side, you would know best how greater party solidarity can be obtained. Some fractionating forces might be weakened by a public-financed-elections law.

These are initial reactions to a thoughtful proposal, and are offered simply as considerations to be weighed in what should be a needed and useful discussion.

With high regard,

Sincerely,

A handwritten signature in dark ink, appearing to read "Paul A. Freund". The signature is fluid and cursive, with a large initial "P" and "F".

Paul A. Freund



The Brookings Institution

1775 MASSACHUSETTS AVENUE N.W. / WASHINGTON D.C. 20036 / CABLES: BROOKINST / TELEPHONE: (202) 797-6000

Governmental Studies Program

August 2, 1979

The Honorable Henry S. Reuss
Room 2413
Rayburn House Office Building
Washington, D.C. 20515

Dear Henry:

Much as I agree with you that our constitutional system needs reform, I cannot bring myself to support your proposal for a constitutional amendment to permit filling up to fifty top positions in the executive branch with sitting senators and representatives. Perhaps some of the features of the parliamentary system can be grafted onto our presidential structure (as you know, I have backed your "vote of confidence" resolution), but I do not believe this one can.

Unless we convert the president himself into a prime minister, drawn from and responsible to the legislative branch, I do not see how it would work to force him to discharge his duties through a subordinate cabinet made up of legislative leaders who would inevitably be nominated by, and responsible to, the Congress rather than to him. That would totally confuse the lines of responsibility, particularly when the Congress and the Presidency are in the hands of opposing parties. In any circumstances, it could only break down cohesion and discipline within the executive branch, which are difficult enough to maintain under present circumstances.

Moreover, given the present trend toward ever-increasing immersion of members of the Congress in administrative detail, the work load on legislators as such is already overwhelming. I do not see how one person could conceivably carry the load of running a department in addition to chairing a committee and performing all the other manifold tasks a legislator performs. Your plan would have to be predicated on drastic changes in practically every attribute of the Congress--how the legislators spend their time, how much they delegate to the executive, how they are motivated, how they are disciplined, and, as the determinant of all these, how they are selected and maintained in office.

In other words, an amendment such as this one could not be considered without a rethinking of the entire system. I would enjoy participating in that, but given the rigidities of the amendment process we would have to recognize that it would be a futile exercise.

Sincerely,

Jim Sundquist

James L. Sundquist
Senior Fellow

Barnard College

DEPARTMENT OF POLITICAL SCIENCE

COLUMBIA UNIVERSITY, NEW YORK 10027

2 August 1979

Henry S. Reuss
House of Representatives
2413 Rayburn House Office Building
Washington, D.C. 20515

Dear Representative Reuss:

I am responding to your letter of July 30, 1979, in which you asked for my thoughts on the merits of your proposed constitutional amendment to allow a limited number of members of Congress to serve in the executive branch without relinquishing their seats in Congress.

I believe the proposal, similar to those made in the past by Augustus Woodward (1809, 1820), Woodrow Wilson (1879), Henry Lockwood (1886), and Thomas Finletter (1946) among others, has as little merit today as it has had in the past. And your proposal, in particular, is cumbersome, since it requires an amendment to the constitution, and inflexible, since it contains in section 2 a rigid timetable and a "bloc" listing which is calculated to create problems in the middle of a Congress.

Consider the following problems with your poorly drafted proposal:

- (1) what is the "Executive Branch?" You might want to indicate clearly that for purposes of this amendment it would include whatever agencies Congress intended it to include pursuant to section 4.
- (2) would the fifty offices be limited to those requiring consent of the Senate?
- (3) could a member of Congress be nominated to an office with a long term, such as a regulatory commission, a public corporation, or the Federal Reserve Board, and retain his office in the executive branch if he were no longer in the subsequent Congress?
- (4) What does "immediately" mean in section 2?
- (5) Can the president submit names at a later time to fill vacancies, or is he restricted to a one shot "list" once every two years? I am thinking in particular of how a president can shuffle his administration under the terms of section 2.

Barnard College

DEPARTMENT OF POLITICAL SCIENCE

COLUMBIA UNIVERSITY, NEW YORK 10027

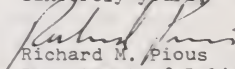
page 2, continued

I have barely touched on the problems with your proposal. I would be delighted to give any member of your staff with an interest in this amendment the benefit of a more extended and sophisticated analysis. Naturally, I would expect in such case to be compensated for my time and expertise at my customary consultant fees.

I wish you luck in the future, since I have always understood you to be one of the handfull of truly brilliant men in the House. I am sorry I cannot be more positive about the particulars of your proposal.

Thank you so much for soliciting my advice.

Sincerely yours,



Richard M. Pious
Department of Political Science
Barnard College

p.s. You might be interested in ways to accomplish a political, as opposed to an administrative, fusion of the two branches at the cabinet level, without a constitutional amendment. I would be delighted to discuss with you my thoughts on this at your convenience.

Duke University
Durham
North Carolina

SCHOOL OF LAW

August 1, 1979

POSTAL CODE 27706

Congressman Henry S. Reuss
Congress of the United States
House of Representatives
Washington, D.C. 20515

Dear Congressman Reuss:

I received your letter and enclosure today, inviting my tentative reactions to a proposed amendment to the Constitution enabling fifty executive offices to be filled by members of Congress. Your own reputation and experience in Congress are most certainly reason enough for thoughtful consideration of such an amendment. I note, too, that Richard Strout of the Christian Science Monitor believes that your proposal would be helpful in surmounting the apparent inefficiencies and frustrations of the present arrangement. Both of you are so thoroughly seasoned in practical ways which I am not as well situated to appraise that I must necessarily hold my own opinion very lightly in these circumstances. Additionally, as I am in no sense a political comparativist (i.e., I have made no study of the workings of the parliamentary systems to which you make reference), I feel even more diffident in responding.

The necessary consequence is that I hold no strong opinion on the matter and such opinion as I do entertain I should want to re-examine in the light of such observations as you and others may bring forward. With these earnest qualifications, I regret that I currently find myself predisposed against the proposal. And in any event, I should desire the benefit of a very careful comparison not only of the workings of the parliamentary arrangements of the several countries to which you refer, but of their transposability to the politics of this country as well under a proposal which is, as you say, not a move to a full parliamentary system -- but something of an (untried?) hybrid. The proposal contemplates so very dramatic an alteration in the constitutional tradition that it ought not be approved unless its necessity and safety are convincingly established. This, rather than any more narrow constitutional concern, is at the basis of my apprehensions.

You have put some of the question to be considered in connection with the proposal at page two of your enclosure. But even here, the technically easy answers could be realistically quite naive and misleading. For instance, one such question is whether a Member of Congress, "now subject to discipline and expulsion only by the House in which they sit, [could] be impeached, a process from which they are now exempt?" Given a suitable expression of understanding in the course of developing the proposed amendment, at the first step I see no particular problem; presumably such an individual could indeed be impeached in respect to alleged acts of "treason, bribery, or other high crimes and misdemeanors" committed in respect to his responsibilities as a "civil officer of the United States," i.e., for impeachable acts in abuse

of the particular executive office that individual would then be concurrently occupying. (The quoted phrases are from Article II, § 4 of the Constitution.)

But this correct and straightforward response is misleading; the narrow question which it answers inadvertently misdirects our attention from the more serious questions. It does so in two respects, the first "constitutional" and the second "political". I shall be specific about each of these.

First, supposing (as I do) that there is no difficulty in applying the impeachment clause to a Member of Congress insofar as the acts on which articles of impeachment are prepared relate only to impeachable misconduct in his different role, as a "civil officer," there is nonetheless a problem that remains. That problem arises because Article I, § 3, cl 7 provides:

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law. (Emphasis added.)

I suppose that being a Member of Congress is itself an office of trust under the United States. If, then, the clause is given its full effect, though a Member of Congress is impeached for his misconduct while serving in the Executive Department, judgment may perforce remove him from Congress as well -- or, surely, at least at once disqualify him for re-election. That construction and outcome seem sound to me. I do not know why a person serving in the executive department or judicial department and impeached and removed for high crimes should (as is the case) be disqualified from thereafter becoming a Member of Congress, and yet a person serving in such a capacity, identically impeached and removed, somehow be deemed nonetheless eligible to stay on in Congress and to be eligible for re-election. The result should follow without any inconsistency with the clause that misconduct by a Member of Congress in Congress shall be judged solely by that House of Congress.

There is a point to this. Note, first, that the proposed amendment generated not but a single question respecting its impact upon two existing clauses (the impeachment clause and the exclusive-congressional-punishment clauses), but at least three existing clauses, i.e., the two already-mentioned ones plus the clause quoted above affecting disqualification from any office holding under the United States. The point in this respect is that a good number of provisions (more than one might first suppose) are affected by a proposed amendment which itself departs from a very central feature of the Constitution -- strict separation of powers -- which feature operates repeatedly as a premise or presupposition of various clauses. The extent of the ramifications need to be very thoroughly explored before so fundamental a change is approved. I could furnish additional examples, but will forbear for now, to keep this letter at least reasonably brief.

The other point is "political." We now know how things work, given the present separation of powers, including of course your own observation that they do not always work very well. We have no idea at all, however, how things would work under the proposed change -- nor do I think the parliamentary analogies are of much help. It is not merely that the history and operative traditions of these international comparisons are very tricky; it is, rather, as you observe, that the proposal does not contemplate a shift to a parliamentary system -- but to something of a novelty, a hybrid system: Nothing changes other than that Congress may provide for fifty executive offices to be staffed by Congress; the "ripple" effects, however, are almost wholly conjectural.

The current arrangement very deliberately is meant to structure the executive and the legislature more "at odds" with one another than some other arrangement, quite despite the foreseeable friction, buck-passing, delays and consternation. In respect even to the very minor issue we have just been reviewing (impeachment), we know that while it does not work terribly well -- it probably works better than a fusion of offices. The direct personnel involvement of Members of Congress in the workings of the Presidency must necessarily raise serious practical questions of divided loyalties, of distance (and of cronyism), casting shadows over the congressional impeachment powers. If fifty of the most influential, senior, and powerfully regarded members of Congress are staffing the fifty most influential executive posts, of what practical efficacy is there to the impeachment clause itself?

If a Member of Congress is also Secretary of Defense, which "Loyalty" then characterizes his higher obligation: to respect and obey the Chief Executive's requirement of some degree of executive confidence (and thus of executive privilege) -- or to respect and obey his obligation as a Member of Congress in circumstances where he (or she) knows that the information he holds (in executive confidence) is plainly germane to what is currently under consideration in Congress -- the withholding of which may be systematically misleading in the fashioning of legislation?

The proposal, to be sure, does not mandate executive staffing of powerful members of Congress; it simply makes it possible, according to legislation so providing, subject to the pleasure of the President and "consent of the Senate." To be sure. But the likelihood is not a trivial one that at once the result will appear. We are mutually fully aware of the wholly nonconstitutional tradition respecting the appointment of federal district court judges; a tradition wholly outside the Constitution, but effectively vesting in Senators the selection of federal district judges to serve in a district within their state. The same process may well operate here: Senate solidarity could readily be established so that no nomination by a President other than of a Member of Congress for a particular post would achieve Senate consent. The additional extent to which the new arrangement would effectively place Congress in command of most executive offices is itself a serious question: Congress may collegially predetermine which among its members shall hold which executive offices.

If a full parliamentary system were envisioned, with corresponding (and

more massive) changes in the Constitution to bring it through, we might have a serious discussion of the pros and cons of that new system. The current proposal, as a hybrid, however, seems to me extremely dubious. The President is separately elected, he is presumably still the Chief Executive with removal-at-will power over his "subordinates," but he may-or-may-not be of the same party as controlling majorities of one or of both houses; he may-or-may-not be able to repose confidence in those whom others (Congress?) selects from within itself to occupy positions without which the Presidency itself is an empty office; Congress may-or-may-not any longer be able to regard itself as distinct from the executive; the dual-office-holding members may-or-may-not be able to sort out their own genuine divisions of loyalties, etc. etc. And it is simply true that a considerable variety of familiar constitutional clauses beyond the very few noted here are premised on the current arrangement: the efficacy and reconcilability of those clauses must be altogether different when the premise itself is altered by amendment.

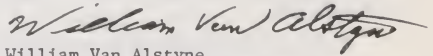
I have had several occasions not merely to read again the clause in the Constitution which the proposal would replace, but occasions also to re-read the original discussions which led to its adoption, that:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

The examples of spoils-system politics, and the felt need to add this clause as further cement to the plan for separated powers, furnished in the early records of discussion, are truly quite telling. I find them persuasive even now.

Like you, albeit not from so close a location nor with such important personal experience to make the impression so vivid, I do share the sense of frustration that comes from the perpetual political tendencies of Congress and of the President to ascribe the faults of our evident inertia to the other. But I cannot help thinking that the insertion of fifty members of Congress into the Executive Department would be no solution: it does not seem to me to represent a full change to a parliamentary system (which I think, incidentally, has serious difficulties of its own) even while it does most seriously fracture existing provisions in the Constitution which were not lightly made.

Sincerely,



William Van Alstyne
William R. Perkins Professor of Law

HARVARD UNIVERSITY
LAW SCHOOL

LAURENCE H. TRIBE
Professor of Law



FACULTY OFFICE BLDG. 100
CAMBRIDGE, MASSACHUSETTS 02138
(617) 495-4621

August 1, 1979

The Honorable Henry S. Reuss
The House of Representatives
2413 Rayburn Office Building
Washington, D.C. 20515

Dear Congressman Reuss:

Thank you for your interesting inquiry of July 30. I share your sense that the current pattern of checks and balances might sometimes contribute more to governmental paralysis than to governmental responsibility. But I have the gravest reservations about the wisdom of the amendment you are proposing. It does not seem to me likely to overcome the problems of stalemate, and it could exacerbate the problems of accountability. Rather than combine the best features of our system with the best features of parliamentary government, it could well combine the worst of both.

I doubt that any minor changes in the scheme that you envision could save it from objections along these lines. At the same time, you should not regard me as unalterably opposed to your idea; I would reserve final judgment until I had heard more and thought more.

Sincerely,

Laurence H. Tribe

Laurence H. Tribe
Professor of Law

RECEIVED

SEP 11 1979

HENRY S. REUSS

ERNEST S. GRIFFITH
1941 PARKSIDE DRIVE, N. W.
WASHINGTON, D. C. 20012

September 10, 1979

Dear Congressman Reuss

Your letter of July 30 was waiting for me on my return last week from an extended overseas trip. Your suggestion of a Constitutional Amendment to permit M.C.s to serve both ~~on~~ Capitol Hill and in the executive would in my judgement make a considerable contribution to mutual understanding between the two branches.

Who would serve and for how long and in what capacity presents problems. Any amendment might make clear the competence of Congress to prescribe details, as you have done in Section 4.

It seems to me that success would to a considerable degree be determined by the type of person most useful, and by his willingness to serve. If it could be regarded as an honor and an opportunity - especially by his constituents - it would prove attractive.

I would suggest the following - not in the amendment itself, but in the amplifying legislation.

1. No "first terms"

2. Limitation to ~~one~~ single consecutive term ^{of 2 years} ~~(1 year)~~

This would prevent any implication that a change at the end of two years reflected on the M.C.'s success.

3. Leave open the question of party membership.

4. Appointments should in general be to prestigious posts - e.g. Asst. Sec., Supergrades, White House staff, etc.

Reasons for these suggestions are probably obvious. They ^{sound}

have to do with questions of prestige, acceptability to constituency, etc.

If I can be of any further assistance — at hearings or elaboration of points made — I am at your disposal.

Cordially,
Conrad S. Griffith



HOWARD UNIVERSITY

WASHINGTON, D. C. 20059

Department of Political Science

October 3, 1979

Congressman Henry S. Reuss
2473 Rayburn House Office Building
Washington, D. C. 20515

Dear Representative Reuss:

Please excuse my delay in responding to your letter of July 30, 1979 requesting my reaction to your proposed constitutional amendment. I delayed because I wanted to give it careful consideration and I also wanted to discuss it with some of my faculty.

My overall reaction is that the proposed amendment, though laudable in intent, has very little chance of being passed. As you well know, passage of constitutional amendments demands a public perception of need that is absent in the case of this particular issue.

Undoubtedly, more legislative participation in executive policy-making would produce more informed policy. However, given the difficulty in getting a constitutional amendment passed, it might be useful to take smaller, useful steps that do not require a constitutional amendment or even a statute. I have in mind the proposals of Stephen Hess in Organizing the Presidency. The theme of Hess' work is a more "collegial" presidency built around a revitalized cabinet. Such a cabinet would include the House and Senate leaders of the President's party. Although Hess does not advocate it, I suggest the House and Senate whips could also be included. Professor Corwin, in The President: Office and Powers, assured us such a scheme would not violate constitutional separation of powers.

I wish you success in making this change. Enclosed is a copy of a brochure from the forthcoming Blacks, Presidential Politics and Public Policy Conference. I trust you or an aide will be able to attend.

Sincerely,

Marguerite Ross Barnett
Marguerite Ross Barnett
Chairperson



The Ohio State University

Department of Political Science

 223 Derby Hall
 154 North Oval Mall
 Columbus, Ohio 43210

August 11, 1979

Hon. Henry S. Reuss
 Member of Congress
 2413 Rayburn House Office Bldg.
 Washington, D.C. 20515.

Dear Mr. Congressman:

Thank you for your letter of July 30 asking my reaction to the proposed constitutional amendment allowing Members of Congress to hold positions in the Executive Branch.

There is certainly a need for greater understanding on the part of those in both the legislative and executive branches of the problems faced by the other. There is also a record of distinguished service rendered by many Members of Congress, for example, Stewart Udall, Melvin Laird, and Brock Adams, who have accepted cabinet positions. Both of these considerations would warrant serious consideration for an idea such as yours.

At the same time, I think this particular idea would raise serious problems. In recent years, there has been some movement toward cabinet members with relevant professional background and management capabilities. As late as the Kennedy administration, the initial appointees (below State-Defense-Treasury) were from political backgrounds. In the present decade, there have been such appointments as John Dunlop, Edward Levi, Ray Marshall and others whose backgrounds are not political, but whose credentials lie in their mastery of the issues over which their departments have jurisdiction. It is my impression that this shift is at least a partial recognition of the difficulty of managing cabinet departments. It seems to me that this difficult task would not be made easier by placing persons in these positions who had to focus some major share of their attention on their congressional responsibilities.

Then there is the question of whether legislators have enough free time to want to shoulder these additional responsibilities. Many of the institutional developments in recent years, an annual vacation in recognition of the fact that Congress will probably be in session for most of the year, or computer scheduling of Senate committee meetings to lessen the possibility of conflicts between them, seem to speak of too many time demands placed on legislators rather than too few.

Then there is the question of the desirability of some turnover in the House and Senate. As you are well aware, most Representatives who seek reelection are reelected. The lowest percentage of Representatives returned (of those seeking reelection) from 1956 through 1976 was 87%. While a larger number of members have retired voluntarily in recent years, the balance between stability and change is still on the side of stability. Allowing a Member of Congress to retain his seat while serving in the Executive Branch would tend to make the membership even more stable, and thus choke off whatever fresh ideas new members might bring with them.

I hope these reflections add something to the fine list of questions you raised on the second page of your statement.

Thank you for soliciting my reaction.

Yours sincerely,

John H. Kessel
John H. Kessel,
Professor of Political Science.

Columbia University in the City of New York | New York, N.Y. 10027

DEPARTMENT OF POLITICAL SCIENCE

430 W. 116th St.
New York, N.Y.

September 22, 1979

Honorable Henry S. Reuss
U. S. House of Representatives

Dear Henry,

This is a very belated and interim response to your letter of July 30, and enclosure, regarding your proposed constitutional amendment to modify the present flat prohibition against dual office holding, in the executive branch, for a limited number of members of the Congress - The letter came while I was out of the city.

I have read the proposal, which is novel to me, but have not yet given it any systematic study. Plainly, the effects, immediate and ultimate, official and unofficial, of so material a change in long-standing arrangements are speculative to a high degree, as various possibilities are discussed and debated in advance of trial.

It happens by coincidence that I have just been named to a standing committee - a so-called Steering Committee of the National Academy of Public Administration, on Executive-Legislative relations. I will bring

Your proposal to the committee's attention when it meets, later this fall, as a possible subject for further consideration.

Meanwhile, I should be glad to know if you contemplate hearings, and to be kept advised of any further studies in progress; I am much interested -

Sincerely,

Harvey A. Mansfield
Professor Emeritus

THE COLORADO COLLEGE

COLORADO SPRINGS, COLORADO 80903

September 20, 1979

Congressman Henry S. Reuss
 2412 Rayburn House Office Building
 Washington, D.C.

Dear Congressman Reuss:

I continue to be impressed by the boldness of your proposed reforms of government, especially in the area of congressional--presidential relations. If nothing else, it sharpens our thinking and appraisal of our existing arrangements.

On the whole, I have less faith in sweeping structural reform than you do. I do think, however, that your plan merits sustained review.

Please know that I think we can make our existing system better than it is at present. I think processes of consultation can be improved. I think the House could organize itself better to serve its policy functions. Committee streamlining of the kind that Richard Bolling worked on two or three years ago still impresses me as a first order of business. Better, not more, utilization of staff resources would also be vital in helping the situation out.

I have outlined at great length both the strengths and weaknesses of our current cabinet system in a chapter on the cabinet in my book The State of the Presidency (Little, Brown). A new edition of that book with substantial revisions on the cabinet process will be out in December of this year. I hope your staff will obtain a copy of this for you. Meanwhile, some recent thoughts of mine on the Carter cabinet purge, as it was called, is enclosed in an essay that was published in the New York Times Magazine (August 12, 1979).

Even if I oppose the thrust of your reform proposal I would welcome the opportunity of meeting with other scholars and politicians who would wish to debate, discuss and appraise the merits of this plan. I would hope that some committee of the House and some university would plan hearings, symposiums and conferences on the plan. I would welcome an invitation to participate in such a scrutiny.

You have served the nation enormously well these past 25 years. Good luck in your work. If we only had a few score Reuss' in Congress I am sure it would work to near perfection.

Cordially,


 Professor Thomas E. Cronin

WILLIAMS COLLEGE
WILLIAMSTOWN, MASSACHUSETTS 01267

DEPARTMENT OF POLITICAL SCIENCE

August 13, 1979

Hon. Henry S. Reuss
Congress of the United States
House of Representatives
Washington, D.C. 20515

Dear Henry:

I was most interested to have your letter of July 30, enclosing your proposed constitutional amendment, upon returning from vacation.

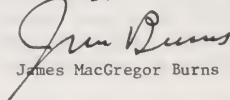
I strongly support this proposal as a way of opening up discussion of the whole question of presidential-congressional relationships. I think the proposal itself is quite ingenious, and if adopted could have the kinds of major results you indicated. However, I doubt that it would bring about to any significant degree more teamwork between President and Congress. What basically keeps the two institutions apart, as was carefully planned by the founders 200 years ago, is institutional responsibility to competing and conflicting constituencies. The only way to remedy this problem, if it needs to be remedied, is through stronger and more unified parties, in my view, or through the kind of drastic constitutional change that I doubt either you or I would support.

In any event, I am impressed by your initiative and imagination in raising the matter. You might want to consider relating this effort, or at least your own future ~~role~~ in proposing constitutional changes, to a project under way, as described in the enclosed folder on Project 87. Professor Richard Morris of Columbia and I chair this project, which is sponsored by the American Historical Association and the American Political Science Association.

We are hoping that, as we come closer to the bicentennial of 1787, we can stimulate a grassroots, nation-wide debate over the adequacy of our constitutional system for the third century of our national existence, and for the 21st century. We are presently making awards in the field of constitutional history in government, and shortly we will begin our stage 2, trying to help in some way to raise the level of teaching of American history and government in high schools. We will then go on to stage 3, as indicated in the flyer, during which we hope that the grassroots discussion of constitutional problems will begin, culminating in 1987.

I hope you get a chance to read the enclosed, and would appreciate any comment. I hope someday I might talk with you personally about the project, and also about your proposed constitutional change. Many thanks for letting me know about it.

Cordially,


James MacGregor Burns

UNIVERSITY OF CALIFORNIA, BERKELEY

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SANTA BARBARA • SANTA CRUZ

OFFICE OF THE DEAN
(415) 842-4670GRADUATE SCHOOL OF PUBLIC POLICY
2607 HEARST AVENUE
BERKELEY, CALIFORNIA 94720

November 2, 1979

Honorable Henry S. Reuss
Fifth District, Wisconsin
2413 Rayburn House Office Building
Washington, D.C. 20515

Dear Representative Reuss:

This is in response to your July 30th letter, inviting response to the constitutional amendment you proposed that would permit members of Congress to serve in key offices of the Executive branch. I assigned your proposal to the thirty-plus students who comprise the second-year class here at the Graduate School of Public Policy, and invited them to exercise their skills at policy analysis in evaluating it. They assumed, at my suggestion, that you were their client and hence they considered the broad problem your proposal addresses as well as the particular means you advanced to resolve it.

The several analyses advanced by the students cover perhaps too much ground and detail to be communicated in full to you in this letter. What I have done, rather, is to select and summarize several key themes of reaction that should be helpful to you in your continued consideration of the proposal.

Let me indicate at the outset that you are not alone in your fundamental concern that the friction between the Legislative and Executive branches, albeit inherent in the separation of powers design, has become excessive in recent years. It is gratifying to see that there are legislators, such as yourself, who are able to rise above the daily immersion in the governmental process, to take a hard look at possible deficiencies in that process, and then to prescribe remedies accordingly. Your capacity and willingness to identify and come to grips with a variety of these basic problems of government structure and operations is all to the good and I hope your involvement and activity in such matters will continue.

Overall, the analyses undertaken by the students led to the conclusion that the operation and effects of the new arrangements you propose are too unpredictable, especially as to whether they would in fact promote

the stated objectives, to warrant support of the proposal. A large number of serious problems were identified and probed, a sample set of which are presented immediately below.

1. Your proposal could tip Presidential-Congressional relations too much in the one direction or the other, rather than reaching some optimal equilibrium that promoted a genuine and more effective collaboration between the two independent branches. It is possible that a President could use his appointments of Representatives and Senators as a powerful lever to promote Congressional support of his policies. And it is equally possible that the Congress could make use of the new arrangements to impose appointees on the President and to heighten the influence of the Congress over the President. Either way--the "Presidentializing" of the Congress or the "Congressionalizing" of the Presidency and Executive branch--would result in reducing friction between the two institutions, but at the excessive cost of undue dominance of the one by the other.
2. The fragmentation of government policy-making derives in part from the de facto semi-autonomy of many Executive branch officials and administrative units. These officials and unit heads have multiple loyalties--to the President, the Congress, interest groups, their own agency, etc.--and as a result it is difficult for the President to get on top of his own Executive branch and to secure coherent and consistent policy from its many parts. Under your proposal, the President's capacities in this regard would be further weakened, because the Congressional incumbents of high Executive offices would have incentives and loyalties that would likely not produce the requisite degree of administrative support of Presidential policy. The President's leverage on such appointees would be minimal, and many of these office holders could reasonably be expected to handle their transient period of service in the Executive branch with an eye to promoting their legislative careers.
3. The evaluations in (1) and (2) above point to a fundamental conceptual flaw in the proposal. A partial "merger" or "fusion" of Legislative and Executive branches will produce predictable results in the direction of greater cooperation only when another key element of the cabinet-parliamentary model--party government and discipline--is alive and well. Without the binding glue of party, the proposal could easily result in exacerbating relations between the two branches (as per item 2 above) or making one too dominant over the other (as per item 1 above). At the present time, however, the influence of party in America appears to be sharply on the decline.
4. What kinds of legislators would be attracted to take on an Executive branch role and what kinds might a President wish to appoint? Unless there was a high degree of overlap in the two answers, the proposal would introduce a major new source of friction between the two branches.

5. A large number of serious practical problems were identified with regard to the difficulties created for the Congressman-Executive official role and for the functioning of Congress as a whole. For example: how would a legislator reconcile his constituency representation concerns with the broader outlook required of his Executive role? What serious risks for his advancement within the House or Senate would a legislator take by absenting himself for a year or more from key legislative activities and relationships? And what risks for his re-election chances? Moreover, the proposal would upset Congressional operations and increase fragmentation there by the loss in expertise, heightened turnover in committee leadership and membership, and the creation of yet another cluster of "influential" legislators.

Many students felt that increased decentralization of authority and power within the House and Senate is a major contributor to the problem you stress, that of stalemated government. Hence it was suggested that the objective sought by your proposal is better met (i.e., "better" in the sense of both more effective and more feasible with respect to the chances for adoption) by concentrating upon ways of avoiding further diffusion of authority in the two houses and of returning greater influence to institutional and party leadership within the Congress. To a large extent, this can be accomplished by changes in Congressional procedures and rules, without need for either legislation or amendment of the Constitution. In the absence of an adequately structured Congress, there are sharp limits on what can be done to promote cooperation between the two branches.

I hope that these comments on your proposal will be of help to you in considering the amendment and other ways of dealing with the very important problem which it addresses. Speaking on behalf of the School students as well as myself, we appreciated the chance to review your proposal and your invitation to let you know our reactions. I would welcome comparable invitations on other proposals you may have dealing with governmental design and operations.

Sincerely,

Allan P. Sandler

Allan P. Sandler
Dean

V. COMMENTS ON PROPOSED AMENDMENT BY MEMBERS OF CONGRESS

DAN GLICKMAN
FOURTH DISTRICT—KANSAS

COMMITTEES:
AGRICULTURE
SCIENCE AND TECHNOLOGY
NATIONAL ALCOHOL FUELS
COMMISSION

MYRNE ROE
ADMINISTRATIVE ASSISTANT
BILL BEACHY
EXECUTIVE ASSISTANT



CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20515

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201 NORTH MAIN
HUTCHINSON, KANSAS 67501
(316) 669-6011

August 3, 1979

Honorable Henry Reuss
United States House of Representatives
2413 Rayburn House Office Building
Washington, D. C. 20515

Dear Henry:

Thanks for your recent note calling to my attention the proposal you've put together to amend the Constitution. I certainly appreciate the fact that you took the time to ask for my comments in advance of introduction. I must say that I have some real reservations about the idea you propose.

As you note in the materials you sent, your proposal would dramatically alter the framework of government under which we have operated to date. Your proposal strikes me as something of a hybrid between our system and a parliamentary system, and that is a pretty dramatic change to make to a system which has served us generally very well.

Beyond that philosophical problem with the idea, I think we need to consider what is involved in the present job of serving in the Congress. As we both know, the demands on Members of the Congress are heavy already; we are all forced to say no time and again to requests for our time. I don't think that simply alleviating the pressure of committee work would allow for a Member to adequately fulfill his role here on Capitol Hill and in the Administration. I also think there would be some conflicts involved in terms of representing a particular constituency when it comes to making administrative decisions. Finally, I would think that most Americans feel they deserve full-time representation in the Congress, and would not be interested in having their Representative or Senator taken away from his responsibilities representing them.

In closing, Henry, I do want you to know that I certainly agree that there is a problem that needs to be addressed in terms of improved cooperation between the executive and legislative branches, and I would, of course, be glad to look at any other ideas or refinements to this one which you might have. And, if I come up with any, I'll let you know.

With best regards,

Dan
Dan Glickman

JAMES R. JONES
FIRST DISTRICT, OKLAHOMA

MEMBER:
COMMITTEE ON WAYS
AND MEANS
TRADE SUBCOMMITTEE

COMMITTEE ON THE BUDGET

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(918) 581-7111

Congress of the United States
House of Representatives
Washington, D.C. 20515

August 2, 1979

Congressman Henry S. Reuss
2413 Rayburn H.O.B.
Washington, D. C. 20515

Dear Henry:

Thank you for sharing your idea of a proposed Constitutional amendment to allow Members of Congress to serve in key Executive Branch offices.

I have not given serious consideration to this idea prior to receiving your letter, but my first reaction to it is somewhat negative because I think it edges too close to a parliamentary style of democracy which I would not care to see developed in the United States. Second, my personal feeling regarding Constitutional amendments is that they should be limited to those which expand voting rights and human freedoms for all Americans. Beyond this, I worry that we are tinkering too much with the underlying basis of our democratic tradition.

I will keep an open mind on this issue, however, and I thank you for an opportunity to offer frank advice on this subject. Thanks again, Henry.

With best wishes,

Sincerely yours,


JAMES R. JONES
Member of Congress

COMMITTEES:

BUDGET

CHAIRMAN, TASK FORCE ON INFLATION

EDUCATION AND LABOR

CHAIRMAN, SUBCOMMITTEE ON SELECT
EDUCATIONCOMMISSION ON SECURITY AND
COOPERATION IN EUROPE

PAUL SIMON

24TH DISTRICT, ILLINOIS

Congress of the United States
House of Representatives
Washington, D.C. 20515

August 1, 1979

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(618) 932-3560

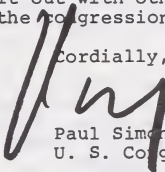
The Honorable Henry Reuss
 2413 Rayburn House Office Building
 Washington, D.C. 20515

Dear Henry:

I react favorably to your idea. I think it would make Congress a more responsible body though I tend to think that the number should be 20 or 25 rather than 50.

That's strictly a visceral reaction that may be wrong. You probably should sound it out with others, particularly those who are not part of the congressional scene.

Cordially,



Paul Simon
 U. S. Congressman

PAUL N. McCLOSKEY, JR.
12TH DISTRICT, CALIFORNIA

COMMITTEE ON
GOVERNMENT OPERATIONS
AND
COMMITTEE ON
MERCHANT MARINE
AND FISHERIES

Congress of the United States
House of Representatives
Washington, D.C. 20515

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PALO ALTO, CALIFORNIA 94306
(415) 326-7383
(408) 275-7462

July 31, 1979

The Honorable Henry S. Reuss
Member of Congress
2413 Rayburn HOB
Washington, D.C. 20515

Dear Henry:

At first blush, I was deeply opposed to your proposed constitutional amendment to permit legislators to serve in the Executive Branch.

On second thought, I remain opposed, but am grateful to you for bringing up the comparison between the Parliamentary system of England and other nations and our own "Separation of Power/Check and Balance" system of government.

It is indeed possible that too much "check and balance" has developed, and that we are endangering our ability to survive and prosper as a nation by excessive friction between the Executive and Legislative Branches.

In the past, I have felt that this friction could have been eased by more sophisticated and knowledgeable conduct on the part of the Carter Administration personnel, and that this temporary problem would be cured by the election of a new President of more sensitivity and abilities in dealing with the Congress.

I have to confess, however, that your idea is well worth study despite my gut reaction and opposition.

Keep leading.

Sincerely,



Paul N. McCloskey, Jr.

JAMES M. COLLINS
THIRD DISTRICT, TEXAS

COMMITTEES:
INTERSTATE AND FOREIGN
COMMERCE

COMMUNICATIONS
ENERGY
POLICY

Congress of the United States
House of Representatives
Washington, D.C. 20515

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TELEPHONE: 787-4648

July 27, 1979

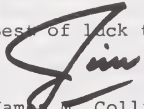
Honorable Henry S. Reuss
Room 2413 Rayburn H.O.B.
Washington, D.C.

Dear Henry:

Your idea of a constitutional amendment to allow members of Congress to serve is excellent. Since the American people respond more to emotion than they do to logic, I do not know whether it will be acted upon or not.

But this is a most progressive idea. It would be better for Congress and it would also provide better administration. I only had one thought as I reviewed it. I would not think the compensation should be more than their regular salary as a Congressman. If they got a job that paid more than they had in their Congressional job, they would be reluctant to return to service on the Hill. So I would basically just eliminate Section 3, or otherwise specify that their salary shall remain the level of a Congressman as long as they were in that elected position.

Best of luck to you,


James M. Collins, M.C.

TONY COELHO
15TH DISTRICT, CALIFORNIA

COMMITTEE ON AGRICULTURE

SUBCOMMITTEES:

COTTON

DAIRY AND POULTRY

FORESTS

COMMITTEE ON VETERANS' AFFAIRS

SUBCOMMITTEES:

COMPENSATION, PENSION,
INSURANCE AND MEMORIAL
AFFAIRS

MEDICAL FACILITIES AND BENEFITS



Congress of the United States
House of Representatives
Washington, D.C. 20515

September 18, 1979

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(209) 383-4455

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1125 J STREET
MODESTO, CALIFORNIA 95354
(209) 527-1914

Honorable Henry Reuss
2413 Rayburn H.O.B.
Washington, D.C. 20515

Dear Henry:

Now that things have settled down a bit after the recent district work period, I have had the opportunity to review your proposal for a constitutional amendment to allow Members of Congress to serve in key Executive Branch Offices.

The concept of your proposal is very interesting, and one that I feel merits serious consideration. To have the broad interests of the Executive Branch tempered by the more localized interests of the Legislative Branch could certainly be a plus for our system.

In your own analysis of the proposal, you raise some very important questions which obviously must be worked out before a system of this type could be implemented with any amount of success. One of the more serious questions which you raise is the use of a Member's time. As a freshman Member, I constantly find that there is always more to get done, not only in terms of constituent work, but also in legislative work. I think that I would find it quite difficult to take on a responsibility, if the opportunity arose, of the nature of your proposal regardless how worthy. Of course, these are my own experiences which may not be the case with other Members.

Henry, while I would be interested in seeing more details on this proposal, I might suggest that you would set this up on an experimental base rather than immediately adding it to the constitution. It would be much easier to improve upon a trial system than it would be to rewrite an amendment to the constitution.

I hope my comments are of use, and please keep me informed.

With best wishes.

Sincerely,

TONY COELHO
MEMBER OF CONGRESS

JAMIE L. WHITTEN
1ST DISTRICT, MISSISSIPPI
2314 HOUSE OFFICE BUILDING
(202) 225-4306

CHAIRMAN
COMMITTEE ON APPROPRIATIONS

Congress of the United States
House of Representatives
Washington, D.C. 20515

September 18, 1979

Hon. Henry S. Reuss
House of Representatives
Washington, D. C. 20515

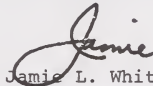
Dear Henry:

Your letter and enclosure with regard to a Constitutional Amendment arrived right before the Recess, as you know, and I didn't have time to study it then. I've looked it over carefully several times since getting back in town and, while it may not be original, my main reservation is "time." With the pace around here increasing every year, it seems to me it's becoming more and more difficult to keep ourselves informed on legislative matters, without trying to put on another hat.

As you point out, the mechanics of this have been worked out by other countries and perhaps it would work here. I'll be glad to discuss it with you further.

With kindest regards and best wishes,

Sincerely,



Jamie L. Whitten, M.C.

WES WATKINS
3RD DISTRICT, OKLAHOMA
(202) 225-4585

MAJORITY ZONE WHIP

CHAIRMAN
CONGRESSIONAL RURAL
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CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES

WASHINGTON, D.C. 20515

COMMITTEES:

BANKING, FINANCE AND URBAN
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SCIENCE AND TECHNOLOGY

SELECT
COMMITTEE ON AGING

August 24, 1979

Honorable Henry S. Reuss
2413 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

The idea of a constitutional amendment that would allow Members of the House and Senate to serve in a given number of positions in the Executive Branch is an interesting proposition -- although one I had never applied to government structure in the United States. I believe any proposal that would enhance government should be given due consideration, however.

Your request for comments has brought several thoughts to mind, thoughts along the line of how the proposal might work or how a member would juggle both jobs, both time-consuming and both demanding.

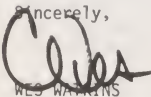
I think the time required to do both jobs is the major question in my mind -- whether a Member of the House or Senate simply would have the time in one day to do an effective job in two demanding positions.

The other question that comes to mind is whether an individual can "serve two masters." Since the Executive Branch is a policy-making branch, would a Member be caught in the middle between an Executive Branch policy and a Legislative Branch decision, either because of political party affiliation, personal beliefs or perhaps constituent pressure?

You noted there are a number of very basic, very important questions to be answered about the concept. I wholeheartedly agree, but would like to be kept posted on your progress.

If I can help you on this or any other issue, please do not hesitate to let me know.

Sincerely,



WES WATKINS
Member of Congress

ROBERT McCLORY
13TH DISTRICT, ILLINOIS

ROOM 2489
RAYBURN HOUSE OFFICE BUILDING
(202) 225-5221

RANKING REPUBLICAN
JUDICIARY COMMITTEE

PERMANENT SELECT COMMITTEE
ON INTELLIGENCE

U.S. INTERPARLIAMENTARY
UNION DELEGATION

Congress of the United States
House of Representatives
Washington, D.C. 20515

August 17, 1979

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CRYSTAL LAKE, ILLINOIS 60014
(815) 459-3399

The Hon. Henry S. Reuss
2413 Rayburn House Office Bldg.
Washington, D. C. 20515

Dear Henry:

Thank you for sending me your proposed Constitutional Amendment to Permit Members of Congress to Serve in Key Executive Branch Offices.

In reflecting upon this idea I feel that such an amendment to our Constitution would be most unwise. While the primary purpose would be to overcome the legislative-executive stalemate, the result might well be to destroy the independence of our respective executive and legislative branches of government. Certainly the benefits from meaningful oversight would be diminished if the oversight involved challenges to our own Members.

You and I can recall that President Nixon resigned from office because Republicans in Congress told him to leave. Because of their constitutional and practical independence, Barry Goldwater and John Rhodes and others could tell their President his days were over. But suppose 50 Congressmen had then occupied key executive posts. Would such a mix between the branches have been healthy for the country?

I am aware that President Carter and his aides appear incapable of dealing with the major domestic and international issues and they would like to place blame upon an uncooperative Congress. However, I'm inclined to the belief that the Carter Administration inadequacies are to be found within the White House itself. Another President - be he Republican or Democrat - would be unlikely to experience the same difficulties. In other words, it is not the Constitution that is hampering the Carter Administration, it is the inexperienced and intransigent personalities who need to be replaced.

Sincerely yours,

Robert McClory

LEE H. HAMILTON
8TH DISTRICT, INDIANA

COMMITTEES:

INTERNATIONAL RELATIONS

JOINT ECONOMIC

STANDARDS OF OFFICIAL CONDUCT

Congress of the United States
House of Representatives

Washington, D.C. 20515

August 16, 1979

2470 RAYBURN BUILDING
WASHINGTON, D.C. 20515
TELEPHONE: (202) 225-5315

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TELEPHONE: (317) 269-4013

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TELEPHONE: (812) 288-3281

P.O. Box 289
AURORA, INDIANA 47001
TELEPHONE: (812) 928-3535

The Honorable Henry S. Reuss, M.C.
U.S. House of Representatives
2413 Rayburn House Office Building
Washington, D.C. 20515

Dear Henry:

I received your proposed constitutional amendment to permit Members of Congress to serve in key posts in the executive branch. Thank you for taking the time to send it to me.

I am intrigued by your amendment, and I will be looking into it very carefully in the weeks ahead. I think I can say at the outset that it has considerable merit.

With best wishes, I am

Sincerely yours,



LEE H. HAMILTON, M.C.

WILLIAM H. GRAY, III
2ND DISTRICT, PENNSYLVANIA

COMMITTEES:

DEMOCRATIC STEERING AND
POLICY
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ECONOMIC POLICY, PROJECTIONS
AND PRODUCTIVITY

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INTERNATIONAL OPERATIONS
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Congress of the United States
House of Representatives
Washington, D.C. 20515

August 16, 1979

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SUBCOMMITTEE:

FISCAL AFFAIRS AND HEALTH

SECRETARY OF THE
CONGRESSIONAL BLACK CAUCUS

DISTRICT OF COLUMBIA OFFICE:

429 CANNON HOUSE OFFICE BUILDING
WASHINGTON, D.C. 20515

(202) 225-4001

DISTRICT OFFICE:

6753 GERMANTOWN AVENUE
PHILADELPHIA, PENNSYLVANIA 19119
(215) 438-6070

The Honorable Henry S. Reuss
U.S. House of Representatives
2413 Rayburn Bldg.
Washington, D.C. 20515

Dear *Mr. Chairman* Henry:

Thank you for sending a copy of the proposal to amend the Constitution to allow members of Congress to serve in key Executive Branch offices.

After having only served eight months here in the House of Representatives, I am wondering where a member would find five extra minutes to spend time off the Hill -- even if he did not have to worry about committee business.

Seriously, the proposal raises some interesting questions. I look forward to reading it through carefully.

Sincerely,

Bill

William H. Gray, III
Member of Congress

NINETY-SIXTH CONGRESS

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GENERAL COUNSEL:
JOSEPH L. NELLIS
STAFF DIRECTOR:
GARNER J. CLINE
ASSOCIATE COUNSEL:
FRANKLIN S. POLA

Congress of the United States
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515
Telephone: 202-225-3951

August 1, 1979

Honorable Henry S. Reuss
2413 Rayburn Building
Washington, D. C. 20515

Dear Henry:

I have your letter of July 23 on a proposed constitutional amendment to permit Members of Congress to serve in the Executive Branch.

Obviously, such a proposal will require detailed and careful study, since it affects separation of powers and the system of checks and balances which has served our Nation so well over the past two centuries.

I have asked the General Counsel of the Judiciary Committee to study this proposal and I will contact you on receipt of his opinion.

Sincerely,



PETER W. RODINO, JR.
Chairman

DON EDWARDS
10TH DISTRICT, CALIFORNIA

COMMITTEE ON
JUDICIARY

CHAIRMAN
SUBCOMMITTEE ON
CIVIL AND
CONSTITUTIONAL RIGHTS

COMMITTEE ON
VETERANS' AFFAIRS

Congress of the United States
House of Representatives
Washington, D.C. 20515

August 6, 1979

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(202) 225-3072

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1825 THE ALAMEDA
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(408) 292-0143

38750 PASO PADRE PARKWAY
FREMONT, CALIFORNIA 94536
(415) 782-5320

22300 FOOTHILL BOULEVARD
MAYNARD, CALIFORNIA 94541
(415) 846-0242

The Honorable Henry S. Reuss
2413 Rayburn House Office Building
Washington, DC 20515

Dear Henry:

Thanks for sending me a copy of your proposed constitutional amendment to allow Members of Congress to serve in key Executive Branch offices. Although I have not studied it as yet in any detail, I can understand clearly the rationale for such an amendment. Perhaps there is now so much separation that government suffers.

You shall hear from me as soon as we have a chance to think about the proposal and poll the subcommittee members.

Sincerely,



Don Edwards, Chairman
Subcommittee on Civil and
Constitutional Rights
House Committee on the
Judiciary

MORRIS K. UDALL
2d DISTRICT OF ARIZONA

235 CANNON HOUSE OFFICE BUILDING
202/225-4065

DISTRICT OFFICE:
404 WEST CONGRESS
TUCSON, ARIZONA 85701
602/792-640

COMMITTEES:
INTERIOR AND INSULAR AFFAIRS
CHAIRMAN

POST OFFICE AND CIVIL SERVICE

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20515
July 27, 1979

The Honorable Henry S. Reuss
U.S. House of Representatives
Washington, D.C. 20515

Dear Henry:

Thanks for your note on the constitutional amendment to allow Members of Congress to serve in the Executive Branch. It's an old idea that I have been intrigued by, and I may end up cosponsoring your proposal. I do want to think about it awhile however.

Best regards.

Sincerely,



MORRIS K. UDALL

MARTIN OLAV SABO
5th District, Minnesota

COMMITTEE ON APPROPRIATIONS

Subcommittees:

Housing & Urban Development
and Independent Agencies

Transportation



Congress of the United States
House of Representatives
Washington, D.C. 20515

426 Cannon House Office Building
Washington, D.C. 20515
(202) 725-4756

106 Federal Courts Building
110 South 4th Street
Minneapolis, Minnesota 55401
(612) 725-2081

August 1, 1979

The Honorable Henry S. Reuss
U.S. House of Representatives
2413 Rayburn House Office Building
Washington, D.C. 20515

Dear Henry:

Thank you very much for your letter of July 23, regarding a proposed constitutional amendment that would allow Members of Congress to serve in Executive Branch offices, currently prohibited by the constitution.

I am very intrigued by this idea and am very interested in learning more about this matter. This proposed constitutional amendment is indeed a viable possibility and I encourage you to continue to work on it and study the issue.

Again, thank you for sharing this idea with me. I hope to hear more of this matter in the future.

Sincerely,

Martin O. Sabo
Member of Congress

M. CALDWELL BUTLER
8TH DISTRICT, VIRGINIA

MEMBER:
COMMITTEE ON THE JUDICIARY
COMMITTEE ON
GOVERNMENT OPERATIONS

WASHINGTON OFFICE:
409 CANNON HOUSE OFFICE BUILDING
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Congress of the United States
House of Representatives
Washington, D.C. 20515

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(804) 845-1378

111 FEDERAL BUILDING AND POST OFFICE
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P.O. Box 1045
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(IN STAUNTON DIAL "0" ASK FOR ENTERPRISE 78)

402 RICHARD H. POFF FEDERAL BUILDING
AND U.S. COURTHOUSE
210 W. FRANKLIN ROAD
P.O. Box 855
ROANOKE, VIRGINIA 24005
(703) 982-6200

August 3, 1979

Honorable Henry S. Reuss
U.S. House of Representatives
2413 Rayburn House Office Building
Washington, D.C. 20515

Dear Henry:

Thank you for your letter of July 23 regarding a proposed constitutional amendment to allow Members of Congress to serve in key Executive Branch offices.

There is no way I can support an amendment of this nature, but I do appreciate your bringing this to my attention.

With kindest regards, I am

Very truly yours,

M Caldwell Butler
M. Caldwell Butler

CLEMENT J. ZABLOCKI
4TH DISTRICT, WISCONSIN

CHAIRMAN
COMMITTEE ON
INTERNATIONAL RELATIONS

Congress of the United States
House of Representatives
Washington, D.C. 20515

August 8, 1979

Hon. Henry S. Reuss
Member of Congress
2413 RHOB

Dear Henry:

I have reviewed with interest the proposed Constitutional amendment you enclosed with your letter of July 23, 1979, as well as your comments concerning it.

Your proposal is certainly most intriguing and does have the potential to contribute to improved decision-making at the Federal level. At the same time, I agree that the questions you have raised need to be carefully examined and, indeed, answered before proceeding much further.

I will be looking forward to the opportunity of discussing your proposal with you at an early date.

With best wishes, I am

Sincerely yours,



CLEMENT J. ZABLOCKI
Member of Congress

CARLO D. PERKINS
7TH DIST., KENTUCKY

COMMITTEE:
EDUCATION AND LABOR

Congress of the United States
House of Representatives
Washington, D.C. 20515

August 1, 1979

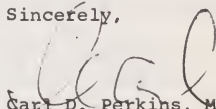
Honorable Henry S. Reuss
2413 Rayburn HOB
Washington, D.C. 20515

Dear Henry:

I want to thank you for sending me a copy of the proposed constitutional amendment to allow Members to serve in key Executive Branch offices. I agree entirely with this proposition.

With best wishes, I am,

Sincerely,



Carl D. Perkins, M.C.

ABRAHAM RIBICOFF, CONN., CHAIRMAN

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 CHIEF COUNSEL AND STAFF DIRECTOR

United States Senate

COMMITTEE ON
 GOVERNMENTAL AFFAIRS
 WASHINGTON, D.C. 20510

August 3, 1979

Honorable Henry S. Reuss
 2413 Rayburn House Office Building
 Washington, D.C. 20515

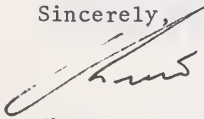
Dear Henry:

Thank you for your letter and enclosed proposal to amend the Constitution to allow Members of Congress to serve simultaneously in the Executive Branch.

While such a system would bring some advantages with it, my opinion at this time is that the type of negatives that you raise yourself would outweigh these advantages.

It is an interesting idea, however, and I would be interested in knowing of any action you contemplate with regard to it.

Sincerely,



Charles H. Percy
 United States Senator

CHP;amc

DONALD W. RIEGLE, JR.
MICHIGAN

United States Senate

WASHINGTON, D.C. 20510

COMMITTEES:
BANKING, HOUSING, AND
URBAN AFFAIRS
COMMERCE, SCIENCE, AND
TRANSPORTATION
HUMAN RESOURCES

August 1, 1979

Honorable Henry S. Reuss
Chairman
House Banking Committee
Suite 2413 Rayburn
U. S. House of Representatives
Washington, D. C. 20515

Dear Henry:

This is in response to your letter July 23, which outlined a proposed constitutional amendment for cross-transfer of members of Congress to Executive branch positions.

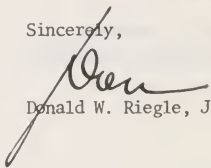
I believe that such a proposal does contain some merit and might help alleviate legislative/executive stalemates. It also represents an innovative approach to some of the basic problems facing us.

As I reflect on the proposal, however, I keep coming back to the fact that we are already in an overload situation with regard to job content and responsibility. Not only in the legislative process, but also in terms of meeting with constituents here in Washington and at home. I am afraid that the proposed amendment might lead to superficial interfacing in all areas and result in greater voter alienation with their elected representatives.

Therefore, I cannot promise you enthusiastic support of the amendment. But, "nothing ventured-nothing gained" -- perhaps something along the line of your proposal, yet with a different tangent might be workable.

Best regards,

Sincerely,



Donald W. Riegle, Jr.

JOHN C. STENNIS, MISS., CHAIRMAN

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United States Senate

COMMITTEE ON ARMED SERVICES

WASHINGTON, D.C. 20510

FRANCIS J. SULLIVAN, STAFF DIRECTOR

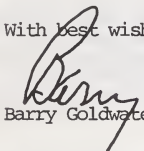
July 31, 1979

The Honorable Henry S. Reuss
 United States House of Representatives
 Washington, D. C. 20515

Dear Henry:

Relative to your recent inquiry about the proposed Constitutional Amendment allowing Members of Congress to serve as Cabinet officials, I think it is a bad idea. We are having a hard enough time as it is to keep this old Republic on its constitutional track, and I am concerned that by weakening our separation of powers system, it would destroy an essential feature of the checks-and-balances which has helped to make our country successful and unique among all societies.

With best wishes,


 Barry Goldwater

WILLIAM PROXMIRE
WISCONSIN

United States Senate

WASHINGTON, D.C. 20510

July 31, 1979

The Honorable Henry S. Reuss
House of Representatives
Washington, D. C. 20515

Dear Henry:

Thank you for sending me your proposed constitutional amendment to allow Members of Congress to serve in key Executive Branch offices.

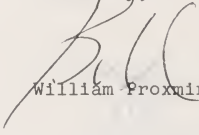
You ask for my reaction, I hesitate to give it because, frankly, it is not enthusiastic.

I've always felt as a matter of principle that the presidential system is far better for this country than a parliamentary system.

You propose what seems to me to be a hybrid. The Montesquieu notion that they who determine the law should not execute it makes sense to me and just the sheer demand on time that our legislative duties require would seem to me to rule out, as a matter of practical fact, the ability of a Member of Congress to do any kind of a job as a legislator and as a member of the Executive Branch at the same time.

Nevertheless, it is an intriguing idea. We need new ideas even the ones that I don't agree with.

Sincerely,


William Proxmire, U.S.S.

WARREN G. MAGNUSON, WASH., CHAIRMAN

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WALTER D. HUDDELETON, KY.
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JIM SASSER, TENN.
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DALE BUMPERS, ARK.
JOHN A. DURBIN, ILL.

MILTON R. YOUNG, N. DAK.
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LOWELL P. WEICKER, JR., CONN.
JAMES A. MC CLURE, IDAHO
PAUL LAXALT, NEV.
JANE GARN, UTAH
HARRISON SCHMITT, N. MEX.

United States Senate

COMMITTEE ON APPROPRIATIONS
WASHINGTON, D.C. 20510

July 30, 1979

W. FEATHERSTONE REID, STAFF DIRECTOR
JOEL E. BONNER, JR., MINORITY STAFF DIRECTOR

Honorable Henry S. Reuss
Member of Congress
U. S. House of Representatives
Washington, D. C. 20515

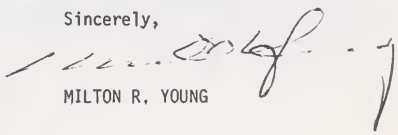
Dear Henry:

Just a note to acknowledge and thank you for your letter of July 23, concerning a proposed constitutional amendment which would allow Members of Congress to serve in key Executive Branch offices.

This is a very intriguing idea, and somewhat in line with the parliamentary system under which Members of the House of Commons are also cabinet members. I am not sure just how it would work under our system. However, it would appear to have merit.

With kind regards,

Sincerely,


MILTON R. YOUNG

EDWARD M. KENNEDY, MASS., CHAIRMAN

BIRCH BAYH, IND.
 ROBERT C. BYRD, W. VA.
 JOSEPH R. BIDEN, JR., DEL.
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 PATRICK J. LEAHY, VT.
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 ALAN K. SIMPSON, WYO.

United States Senate

COMMITTEE ON THE JUDICIARY
 WASHINGTON, D.C. 20510

DAVID ROTES
 CHIEF COUNSEL AND STAFF DIRECTOR

August 16, 1979

The Honorable Henry Reuss
 House of Representatives
 2413 Rayburn Office Building
 Washington, D.C. 20515

Dear Henry:

I am in receipt of your July 23, 1979, correspondence concerning a proposed amendment to allow Members of Congress to serve in certain positions within the Executive Branch.

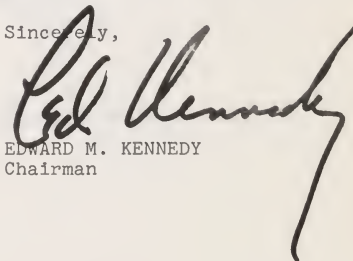
Your suggestions are indeed novel and warrant further study and political analysis. As you point out, the fundamental principle of separation of powers would be a major consideration.

The legislature, as an institution, serves a vital role vis-a-vis the executive branch. Its role as a check and balance to executive action derives from its separate and independent stature. A proposition which would blur these lines is one that requires the closest scrutiny.

I appreciate your forwarding your proposal to me for review. If any record is developed in this connection do not hesitate to transmit a copy to Senator Bayh's Subcommittee on the Constitution.

With best wishes,

Sincerely,



EDWARD M. KENNEDY
 Chairman

HENRY BELLMON
OKLAHOMA

COMMITTEE:
BUDGET
APPROPRIATIONS
ENERGY AND NATURAL
RESOURCES

United States Senate

WASHINGTON, D.C. 20510

September 13, 1979

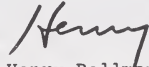
The Honorable Henry S. Reuss
House of Representatives
Washington, D. C.

Dear Henry:

Of all the Members of the Senate, I am probably one of those most reluctant to amend the U.S. Constitution. I feel that document has served the country well over the 200 year history and I am hesitant to change it except for the most urgent and necessary reasons. Therefore, while I concur with the objective you have in mind, I doubt that I could join in the sponsorship of your proposal.

If there is any other way that a cross fertilization would allow elected Members of Congress to gain a better insight into the workings of the Executive Branch and to pass on a better understanding of the legislative process, I would be happy to discuss them with you. However, as I said above, I am reluctant to amend the constitution in the manner you describe.

Sincerely,


Henry Bellmon

ABRAHAM RIBICOFF, CONN., CHAIRMAN
 HENRY M. JACKSON, WASH.
 THOMAS F. EAGLETON, MO.
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RICHARD A. WEBMAN
 CHIEF COUNSEL AND STAFF DIRECTOR

United States Senate

COMMITTEE ON
 GOVERNMENTAL AFFAIRS
 WASHINGTON, D.C. 20510

August 13, 1979

Honorable Henry S. Reuss
 U.S. House of Representatives
 2413 Rayburn House Office Building
 Washington, D.C.

Dear Henry:

Thank you for providing me with a copy of your proposal to amend the Constitution so as to permit the appointment of Members of Congress to "key executive branch offices." Under your proposal, as I understand it, Members could continue to serve as Members of Congress during their tenure as executive officers. You have asked for my comments.

I don't like the idea. Aside from the potential problems which would follow from such "commingling" of the executive and legislative departments, I question who among us has the time to serve in Congress and run an executive department.

Sincerely,



John C. Danforth

CARL LEVIN
MICHIGAN

United States Senate
WASHINGTON, D.C. 20510

August 8, 1979

The Honorable Henry S. Reuss
House of Representatives
2413 Rayburn HOB
Washington, D.C.

Dear Henry:

Needless to say, your proposal to allow Members of Congress to serve in the Executive Branch is novel. As this is the first time I have been presented with the idea, my comments are somewhat limited. The questions you pose, however, in your analysis seem to be of such great import that satisfactory answers to them would be a precondition to any serious consideration.

I share your concern about the "stalemate" between the Congress and the President. Certainly the failure to devise and implement a national energy policy is a glaring example. I guess I am too wedded, however, to our system of checks and balances and too enamoured with the basic structure developed in the Constitution to even consider such a significant change. I fear that there would be too many problems in terms of accountability and too little time to manage both roles well.

Thank you for seeking my opinion, however. I would be interested in knowing about any other comments you received.

Sincerely,



Carl Levin

EDWARD M. KENNEDY, MASS., CHAIRMAN
 ERICH SAYRE, IND.
 ROBERT C. BYRD, W. VA.
 JOSEPH R. BIDEN, JR., DEL.
 JOHN C. GULVER, IOWA
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United States Senate

COMMITTEE ON THE JUDICIARY
 WASHINGTON, D.C. 20510

DAVID BOIES
 CHIEF COUNSEL AND STAFF DIRECTOR

August 6, 1979

The Honorable Henry S. Reuss
 United States House of Representatives
 2413 Rayburn House Office Building
 Washington, D.C. 20515

Dear Henry:

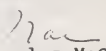
Thank you for sending me a copy of your proposed constitutional amendment which would allow Members of Congress to serve in key Executive Branch offices.

Certainly, your proposal is an intriguing one. In this troubled era we now face, cooperation between the branches of government is crucial. Of course, I would like to examine your proposal very carefully. As you have noted, the effect of this proposal on constitutional principles of separation of powers and checks and balances, in particular, would have to be closely examined.

You can be sure I will pass along any suggestions or comments as I review this legislation.

With best wishes,

Sincerely,


 Charles McC. Mathias, Jr.
 United States Senator

WILLIAM PROXMIRE, WIS., CHAIRMAN
 HARRISON A. WILLIAMS, JR., N.J. JAKE GARN, UTAH
 ALAN GRANSTON, CALIF. JOHN TOWER, TEX.
 ADLAI E. STEVENSON, ILL. H. JOHN HEINZ III, PA.
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 DONALD W. STEWART, ALA.
 PAUL S. TSONGAS, MASS.

KENNETH A. MC LEAN, STAFF DIRECTOR
 M. GANNY WALL, MINORITY STAFF DIRECTOR
 MARY FRANCES DE LA PAVA, CHIEF CLERK

United States Senate

COMMITTEE ON BANKING, HOUSING, AND
 URBAN AFFAIRS

WASHINGTON, D.C. 20510

August 27, 1979

The Honorable Henry S. Reuss
 Member of Congress
 House of Representatives
 2413 Rayburn House Office Building
 Washington, DC 20515

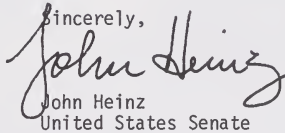
Dear Representative Reuss:

I want to thank you for sending me a description of your proposed constitutional amendment to allow members of Congress to serve in key Executive Branch offices.

Your proposal obviously is the product of much serious contemplation concerning the problems resulting from the current relationship between the Executive and Legislative Branches of our government. The explanation of your proposal that you forwarded to me along with the text of the amendment was cogent and helpful in outlining the issues involved.

I shall give it careful study.

Best wishes,

Sincerely,

 John Heinz
 United States Senate

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